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Abstract

Throughout the world, marriage arguably is one of the most important social and legal institutions. The socially and legally recognised bond between a man and a woman lies at the heart of most families. However, there is no globally uniform understanding of marriage. Its meaning is inseparably linked to culture, religion and social class. The purpose of this essay is limited to providing a comparative perspective on the situation in five different Arab and Islamic countries. The main focus is on the minimum age for marriage. Child marriages are a major concern of both human rights organisations and international treaties. There is a strong link between marriageable age and the overall status of women in society: the earlier a woman marries, the more the time for her education, employment and personal development is constrained.[1]

In many countries, various attempts have been made to ban marriages between minors. In Arab and Islamic countries, difficulties in this area also arise from tensions between traditional interpretations of religious sources on the one hand, and international treaty commitments on the other.

The first section of this paper introduces the classical Islamic law position on marriageability. The second part provides a brief outline of the international framework with regard to the age at which marriage is permitted. The third and central part is dedicated to an analysis of legal developments in five different Islamic countries - Morocco, Egypt, Saudi Arabia, Iran and Afghanistan – as well as a consideration of the political, historical and social framework of marriage in those countries and the current legal situations which apply there. The fourth and final part of the paper recapitulates the results of this analysis and presents the conclusions drawn from it.

I. Part One: Classical Islamic law on marriageability

1. Sharia and the schools of law

Classical Islamic law comprises a system of rules whose development had been more or less completed by the end of the ninth century. It represents a particular interpretation of the religious sources on which it is based. It is not codified, but is set out in a number of substantial private works promulgated by renowned Islamic jurists and scholars who saw it as their task not to develop a new set of laws, but rather to lend formal substance to a set of laws which

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[1] The most influencial factor reducing child marriages seems to be education, cf. the statistics and analyses by UNICEF, Early Marriage: A Harmful Traditional Practice. A Statistical Exploration, passim (2005). Marriages are often postponed until education is finished. On the other hand the educational level also influences the perception of the ideal marriage age, see for instance E. FAWZY, Muslim Personal Status Law in Egypt: The Current Situation and Possibilities of Reform Through Internal Initiatives, in L. Welchman (Ed.), Women's Rights and Islamic Family Law. Perspectives on Reform, 17-94, at 47 (2004) (Egypt). For more general information cf. T. B. HEATON, Socioeconomic and Familial Status of Women Associated With Age at First Marriage in Three Islamic Societies, Vol. 27 No. 1 Journal of Comparative Family Studies 41-58, at 41 et seq. (1996).

were already given and which would endure forever. Islamic law is thus not a national law, but rather a source and a point of reference for a legal order. Hence one has to distinguish the legal codifications of individual countries, such as Egypt, Iran or Afghanistan from classical Islamic law. The relationship between these national legal orders and the sharia varies, as does the Islamic imprint of the laws of these individual states. Islamic law and Islamic legal concepts and perceptions thus refer to transnational phenomena which are linked to the past.

According to classical doctrine, Islamic law is essentially based on four sources, which are ranked as follows: first the Quran and the Sunna (the way, the sayings and the manners of the Prophet) – the two primary sources of Islamic law – then *ijma* (the consensus of legal scholars) and *qiyas* (interpretation through analogy) – the two secondary sources.[2] The Quran is the supreme source of law and is considered an imperative. It consists of 114 *suras* and more than 6,000 verses. Of this total of over 6,000 verses, however, only relatively few – the figure is variously given as anything from 50 to 800 – deal with questions of law.[3] Numerous methods and principles, the *usul al-fiqh*,[4] serve to derive legal rules from the religious sources and to guide the exercise of *ijtihad*,[5] the independent and personal reasoning and interpretation of those sources. The result is a highly elaborated and well-defined, yet at the same time flexible and adaptable, system of jurisprudence, the *fiqh*. The various schools of legal thought also have their own individual methods for interpreting source texts and take differing views on specific legal matters. There are four main schools of legal thought in Sunni Islam: the Hanafi school, the Maliki school, the Shafi'i school and the Hanbali school. The names of the schools refer to the names of the leading legal scholars Abu Hanifa, Malik ibn Anas, Muhammad ibn Idris al-Shafi'i and Ahmad ibn Hanbal.[6] The four schools are regarded as equivalent and believers are free to choose among them. Countries of the Islamic world usually adhere to a specific school, the choice being an expression of the different geographical roots and extensions of the schools: the Hanafi school, which is the largest of the Sunni schools,[7] prevails in Egypt, Lebanon, Syria, Jordan, Afghanistan and Pakistan as well as in Turkey and several Asian countries. The Maliki school predominates in North Africa as well as Kuwait, Bahrain and the United Arab Emirates, whereas the Shafi'i school is preponderant in the countries of Eastern Africa and South East Asia. The Hanbali school of law, which is the smallest and most conservative of the Sunni schools, prevails in Saudi Arabia and Qatar.[8] In addition to the four Sunni schools of law there are also Shia schools of legal thought. Shia is a separate sect of Islam which diverged from the Sunni branch in a succession controversy which arose following the death of the Prophet in 632.[9] The most influential and largest school of Shia Islam is the Jafari school named after the

[2] Cf. M. H. KAMALI, Principles of Islamic Jurisprudence, 3rd Edition 16, 228 (2003); K. S. VIKØR, Between God and the Sultan 3 (2005).

[3] Cf. KAMALI, supra note 2 at 25; A. SAEED, Interpreting the Qur'ān: Towards a Contemporary Approach 16 (2006). The legal section deals with the issues of marriage, divorce, alimony, child custody, paternity, inheritance law, law on the sale of goods, rent, murder, space, military law and the laws of evidence. They constitute the basis of what is called Islamic law.

[4] See KAMALI, supra note 2 at 117.

[5] See KAMALI, supra note 2 at 469.

[6] Cf. W. B. HALLAQ, Authority, Continuity, and Change in Islamic Law 150 (2005); VIKØR, supra note 2 at 89.

[7] Cf. A. SAEED, The Qur'an: An Introduction 17 (2008).

[8] Cf. SAEED, supra note 7 at 17.

[9] The point of contention was the question of whether the Prophet's successor ought to be chosen solely according to his qualifications, as was deemed appropriate by the Sunni view, or whether potential candidates with no blood ties to the Prophet ought to be debarred from succeeding him, as required by the Shia opinion. After the Sunni choice eventually fell on Abu Bakr Abdallah ibn Abi Quhafa al-Siddiq, the Prophet's former father-in-law, the Shia ultimately opted to secede, cf. M. A. SHOMALI, Shi'i Islam. Origins, Faith and Practices, 14 et seq. (2003).

Islamic scholar and imam Ja'far ibn Muhammad al-Sadiq.[10] Besides the Jafari school, there are numerous smaller schools of law in Shia Islam. In Kuwait, Saudi Arabia, Afghanistan, Pakistan and Oman followers of the Jafari school constitute significant minorities, while in Bahrain, Lebanon and Iraq they form the majority of the Muslim population.[11] In Iran, Shia Islam as specified by the Jafari school is the declared state religion. The Shia view not only differs from Sunni Islam with regard to the succession of the Prophet but also in respect of matters of methodology.[12]

The core of sharia law is family law. Family law is at the heart of Islamic law because, within the sharia, it is the branch of the law with the greatest density of regulation emanating from the highest-ranking sources. The reason it has maintained its relevance until the present day is that it is the part of sharia law which was successfully protected against encroachment by European codes during the colonial era and has also remained untouched by the various degrees of secularisation which have occurred in Arab and Islamic countries. While the nineteenth century saw large swathes of Islamic law being eradicated and replaced by codifications on the continental European model, most countries with a predominantly Islamic population have maintained sharia-based family law to this day.[13]

Thus, for many Muslim men and women, family law has become a symbol of collective identity, and adherence to it an absolute and inviolable core of belonging to the Muslim religious community.[14] While, in countries of the Islamic world themselves, family law is an instrument of patriarchal, conservative power and policy, it is also an indispensable source of protection and order for family units both large and small. The way in which religious pronouncements have been codified, however, varies significantly from country to country. Comparative analysis of family-law provisions based on Islamic principles reveals not only the diversity and dynamism of Islamic legal tradition, but also the flexibility and interpretative openness of Islamic legal rules. Given the sheer size of the territory under Islamic influence, the number of individual historical, social, economic and political factors which have shaped the various legal systems is vast and the range of provisions is correspondingly wide.[15]

2. Classical Islamic family law on marriageability

Marriage, *nikah*, in Islam is a highly religious covenant. However, it is not religious in the sense of constituting a sacrament, but rather in the sense of realising the essence of Islam. It is a civil contract legitimising sexual relations and procreation.[16] According to the Quran, everyone who is physically, mentally and financially capable of so doing has the obligation of entering into a marriage.[17] The contract is concluded by mutual consent, with the offer of marriage and its

[10] In Islam the imam is a spiritual leader. The followers of the Jafari school recognise twelve imams, which is why they are also referred to as Twelver Shiites. Ja'far ibn Muhammad al-Sadiq was the sixth of the twelve imams.

[11] Cf. also I. ABDAL-HAQQ, Islamic Law: An Overview of Its Origin and Elements, in H. M. Ramadan (Ed.) Understanding Islamic Law 1-42, 29 (2006).

[12] By way of example, Shia do not recognise *ijma* as a source of law, cf. SHOMALI, supra note 9 at 69.

[13] Cf. N. J. COULSON, A History of Islamic Law, 149 (1964).

[14] Cf. S. POULTER, The Claim to a Separate Islamic System of Personal Status Law for British Muslims, in C. Mallat & J. Connors (Eds.), Islamic Family Law 147-166, at 147 (1990).

[15] Cf. A. A. AN-NA'IM, Islamic Family Law in a Changing World: A Global Resource Book 16, passim (2002); L. WELCHMAN, Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy, passim (2007); J. J. NASIR, The Islamic Law of Personal Status, 3rd Edition 34 (2009).

[16] See J. L. ESPOSITO & N. J. DELONG-BAS (Eds.), Women in Muslim Family Law, 2nd Edition 15 (2001). See also Z. MIR-HOSSEINI, Marriage on Trial. A Study of Islamic Family Law, 2nd Edition 31 (2000).

[17] Cf. sura 24, verses 32 and 33.

acceptance being expressed by the two future spouses or their proxies[18].[19] The state plays no role in these proceedings, its non-involvement being most evident in the fact that registration of the marriage is not a prerequisite for the validity of the marriage contract.[20] According to the Sunni schools of law, the presence of two male witnesses is necessary.[21]

A marriage contract is valid only if both spouses possess full legal capacity. Legal capacity is defined as being both of age and of sound mind.[22] Marriageable age according to classical Islamic law coincides with the occurrence of puberty. The notion of puberty refers to signs of physical maturity such as the emission of semen or the onset of menstruation. In the absence of such signs, the Hanafi school assumes that puberty will occur no later than at eighteen years for males and seventeen years for females.[23] At these ages the spouses are deemed to have attained full legal capacity to enter a marriage and are no longer considered minors in this regard. While marriageable age is not the same as the age of legal majority in civil law, the two age limits may nevertheless correspond.[24] In contrast to the Hanafi opinion, both the Shafi'i and the Hanbali school set the age of the legal capacity to marry at fifteen years for both sexes, while the Maliki school draws the line at seventeen years.[25] According to the Jafari school, fifteen years for boys and nine years for girls is considered as the age of majority.[26] According to the Hanafi school there is a presumption that girls do not reach puberty until the age of nine and boys not until the age of twelve.[27] In Islamic teaching, girls cannot therefore be deemed to have reached puberty any early than nine, while for boys the minimum age is twelve.

Having reached full legal capacity, the spouses are also required to consent freely to the marriage.[28] However, in Maliki, Shafi'i and Hanbali teaching, a woman cannot conclude a marriage contract on her own and is required – despite her legal capacity – to obtain the consent of her guardian, or *wali*.[29] In contrast, both the Hanafi school and the Shia doctrine allow the woman

[18] One must differentiate between the conclusion of the contract by proxy, where the future spouses are of full legal capacity and authorise a proxy in order to conclude the contract for them, and guardianship in marriage. Guardianship in marriage takes place because the ward does not have the legal capacity to decide on the marriage and the power of decision is therefore conferred to the guardian (*wali*), usually the father of the spouse. For a general survey of guardianship see Nasir, supra note 15 at 186 et seq., for more details about guardianship in marriage see J. J. NASIR, The Status of Women Under Islamic Law and Modern Islamic Legislation, 3rd Edition 49 et seq. (2009); NASIR, supra note 15 at 52 et seq. See also R. SHAHAM, Family and the Courts in Modern Egypt. A Study Based on Decisions by the Shari'a Courts, 1900 – 1955, at 43 (1997).

[19] See NASIR, supra note 15 at 48. For more detailed information see K. ALI, Marriage in Classical Islamic Jurisprudence: A Survey of Doctrines, in A. Quraishi & F. E. Vogel (Eds.), The Islamic Marriage Contract. Case Studies in Islamic Family Law 11-45, at 13 et seq. (2008). See also D. S. EL ALAMI, The Marriage Contract in Islamic Law in the Shari'ah and Personal Status Laws of Egypt and Morocco 20 et seq. (1992).

[20] See A. BÜCHLER, Das Islamische Familienrecht: Eine Annäherung unter besonderer Berücksichtigung des Verhältnisses des klassischen Islamischen Rechts zum geltenden Ägyptischen Familienrecht 26 et seq. (2003).

[21] The presence of one male and two female witnesses is considered sufficient as well. By contrast, the presence of witnesses is not necessary according to Shia Islam. See ALI, supra note 19 at 17.

[22] Legal capacity means being of age and of sound mind, see EL ALAMI, supra note 19 at 49.

[23] Cf. L. BAKHTIAR, Encyclopedia of Islamic Law. A Compendium of the Major Schools, 403 (1996).

[24] Cf. WELCHMAN, supra note 15 at 63.

[25] Cf. BAKHTIAR, supra note 23 at 403; M. ZAHRAA, The Legal Capacity of Women in Islamic Law, Vol. 11 No. 3 Arab Law Quarterly 245-263, at 250, footnote 37 (1996).

[26] Cf. BAKHTIAR, supra note 23 at 403.

[27] Cf. A. A. KHAN & T. M. KHAN (Eds.), Encyclopaedia of Islamic Law, Vol. 3, 48 (2007); BAKHTIAR, supra note 2323 at 403.

[28] See A. A. KHAN & T. M. KHAN (Eds.), Encyclopaedia of Islamic Law, Vol. 6, 22 (2007).

[29] Cf. KHAN & KHAN, supra note 28 at 22, 28; E. Y. KRIVENKO, Women, Islam and International Law. Within the Context of the Convention on the Elimination of all Forms of Discrimination against Women, 60 (2009). The main reason given for the necessity of the guardian's contribution is the need to protect the woman, cf. D. S. EL ALAMI, Legal Capacity with Specific Reference to the Marriage Contract, Vol. 6 No. 2 Arab Law Quarterly 190-204, at 193 (1991). However, most Islamic jurists agree that the guardian has the obligation to secure the approval of the bride, see BÜCHLER, supra note 20 at 28.

to act on her own behalf, without an intermediary.[30] Despite this, it is a commonly observed traditional custom for an adult woman to authorise her guardian to settle the contract details in her stead.[31]

Notwithstanding the precondition of mutual consent, all schools recognise the power of a guardian to marry off his ward before she reaches puberty, and it is not uncommon for this in fact to occur shortly after the female child is born.[32] In this case, the consummation of the marriage must be postponed until puberty.[33] The so-called 'option of puberty' offers the minor the possibility of objecting to the marriage upon attaining puberty, for as long as the marriage has not yet been consummated.[34] However, classical opinions agree that this right of objection can be excercised only through a court and that it is applicable only to marriages concluded by a person other than the father or grandfather of the minor.[35]

The issue of child marriage is one on which there is considerable controversy within Islamic teaching. Scholars argue that the core element of the Islamic marriage contract is the consent of both spouses.[36] Thus, a child marriage arranged by the guardians violates the sharia - either because the will of the future spouses is not sufficiently respected or because a minor does not have the mental maturity effectively to consent to marriage. One argument that is often put forward in support of the practice of child marriage is the marriage of the Prophet Muhammad to Aisha, who was only been seven years old when the marriage took place.[37]

3. Modernisation and codification

The main challenges to the classical Islamic position on marriageable age have stemmed from processes of modernisation and codification. Generally speaking, Islamic family-law structures are largely self-regulating, informal in nature, situation-specific and essentially flexible. More importantly, Islamic law is inherently suited to reform. Many efforts are being undertaken to re-read classical Islamic law and to liberate it from rigidities. There is a growing global movement of scholars who are re-reading the fundamental and canonical Islamic texts with a view to finding a perspective which does not essentialise Islamic law or subject it to a generalising construction. This is an initiative which is redynamising Islamic thought.

While independent interpretation of religious sources was something early Islamic scholars took for granted, over time the practice became increasingly restricted. No later than the tenth

[30] See KHAN & KHAN, supra note 28 at 22, 28; NASIR, supra note 15 at 52 et seq. (2009); EL ALAMI, supra note 29 at 193; ZAHRAA, supra note 25 at 257.

[31] With regard to the person of the guardian the schools hold different views. Most give precedence to the father of the bride, namely the Maliki, Shafi'i, Hanbali and the Jafari school, while, according to the Hanafi school, the son of the bride has priority. The schools differ when it comes to the order of priority in the absence of a father or a son respectively, but the majority of them recognises the judge as the ultimate guardian if there is no other possible guardian, see BAKHTIAR, supra note 23 at 425 et seq.

[32] See COULSON, supra note 13 at 178; ZAHRAA, supra note 25 at 259; D. PEARL & W. MENSKI, Muslim Family Law, 3rd Edition 154 (1998).

[33] See ZAHRAA, supra note 25 at 259, footnote 99; BÜCHLER, supra note 20 at 27.

[34] See ZAHRAA, supra note 25 at 259; PEARL & MENSKI, supra note 32 at 143; F. RAHMAN, A Survey of Modernization of Muslim Family Law, Vol. 11 No. 4 International Journal of Middle East Studies 451-465, at 455 (1980) and BÜCHLER, supra note 20 at 29 et seq. If the ward is ignorant of the marriage the option of puberty is lost only if not exercised upon the discovery of the marriage. In contrast, being ignorant of the option of puberty itself does not conserve the right to object, cf. K. HODKINSON, Muslim Family Law: A Sourcebook, 231 (1984).

[35] Cf. NASIR, supra note 18 at 29; H. M. KAMALI, Law in Afghanistan. A Study of the Constitution, Matrimonial Law and the Judiciary 107 (1985); HODKINSON, supra note 34 at 231; I. SCHNEIDER, Registration, Court System, and Procedure in Afghan Family Law, 12 Yearbook of Islamic & Middle Eastern Law 209-234, 222 (2005/2006).

[36] See NASIR, supra note 18 at 28 et seq.

[37] See EL ALAMI, supra note 19 at 51 and SHAHAM, supra note 18 at 53.

century, a broad consensus had become established to the effect that *ijtihad*, the 'gate to independent interpretation', had closed, that Islamic law had been comprehensively structured and interpreted and that its formulation had reached such a stage of completeness and finality that all future generations were bound by the views of their predecessors, who were alone in being authorised to engage in *ijtihad*. The creative legal enthusiasm of Islamic scholars of jurisprudence gradually dried up along with their hermeneutic freedom, with the result that Islamic law became a rigid, ossified and systematically self-contained set of norms on which external influences exerted little sway.[38]

Major changes in Islamic societies, partly due to the fact that Western ways of life and Western science were beginning to infiltrate the Islamic world, prompted new, reform-oriented hermeneutic interpretation of religious source texts. Efforts by Muslim intellectuals to bring about social, political and legal reform were particularly prevalent in the nineteenth century. Under the Ottoman Empire, many of these efforts were aimed at centralising and consolidating the state. Governments' new powers to regulate coalesced with the traditional Islamic legal system, which, until then, had been the sole source of law. Personal status law was the only area in which the dominance of classical Islamic law was left intact.[39] Other efforts were inspired by the state's need to adapt to new economic developments. The inability of the traditional Islamic rules to cope with the complex commercial relationships with European countries which had evolved during the last decades of the nineteenth century resulted in radical reforms, especially in commercial and procedural law.[40] Profound reforms were also associated with the process of colonialisation, which was itself inherently based on the premise that the regulatory power of government, and not the rules developed by Islamic jurists, is the main source of law.[41] Colonialisation not only led to the scope of traditional Islamic law being marginalised, but also meant that the more limited role enjoyed by Islamic law was further encroached upon by statutory regulation.[42]

In family law, the process of codification, as an arena for contesting different positions, is the main force driving reform. The first post-colonial national family-law codes were promulgated in the 1950s and the process of reform - with its patterns of consultation, reciprocal borrowings from jurisprudential arguments and advocacy for progress - continues to this day.[43] This process of codification has continued over the past three decades. It has been characterised, on the one hand, by substantive amendments being made to existing family-law codifications and, on the other hand, by the adoption of a series of newer codifications.[44] In a few countries, howev-

[38] Cf. SAEED, supra note 3 at 145; A. BÜCHLER, Hermeneutik und Recht in der Tradition des Islam, in M. Senn & B. Fritschi (Eds.), Rechtswissenschaft und Hermeneutik, Kongress der Schweizerischen Vereinigung für Rechts- und Sozialphilosophie, ARSP-Beiheft 117, 185-206, at 197 (2009).

[39] Cf. L. ABU-ODEH, Modernizing Muslim Family Law: The Case of Egypt, 37 Vanderbilt Journal of Transnational Law 1043-1146, 1079 (2004).

[40] Cf. ABU-ODEH, supra note 39 at 1084.

[41] Cf. ABU-ODEH, supra note 39 at 1088 et seq.

[42] Cf. ABU-ODEH, supra note 39 at 1088 et seq. The process of codification of Islamic family law began in the Middle East with the Ottoman Law of Family Rights of 1917. In the 1920s and 1940s Egypt enacted some laws concerning family-law matters without issuing an overall code.

[43] See WELCHMAN, supra note 15 at 33. Such codifications emerged, for example, in Jordan (Law No. 92 of 1951 of Family Rights), Syria (Law No. 95 of 1953 of Personal Status), Tunisia (Order No. 13 of 1956 on the Promulgation of the Code on Personal Status), Morocco (Ordinance No. 1-57-343 of 1957 implementing books I and II of the Law of Personal Status) and Iraq (Law No. 188 of 1959 of Personal Status).

[44] New codifications came into force for instance in Qatar (Amiri Decree No. 22 of 2006 regarding the Law of the Family) and the United Arab Emirates (Federal Law No. 28 of 2005 on Personal Status). Important revisions took place in Egypt (Law No. 1 of 2000 regulating certain litigation procedures in personal status), Jordan (Temporary Law No. 82 of 2001 amending the Law of Personal Status) and Morocco (Law No. 70-03 of 2004 on the Family Code).

er, most notably Saudi Arabia, sharia was declared the relevant source of state law and statutory legislation was restricted to administrative matters.

Although no two codes are the same, since legislation is subject to political contingencies reflecting national and international dynamics, the family-law reforms undertaken in many Islamic and Arab countries are nevertheless testimony to processes of modernisation. Polygamy, for example, has been made contingent on certain conditions being met, divorce by repudiation has been made harder, women's rights to petition for divorce have been strengthened, registration requirements for marriage and divorce have been introduced, post-divorce maintenance under certain circumstances has been introduced, the parental custody rights of the mother have been extended and the marriageable age has been raised.[45] Pleas for systematic further progress along this route are regularly heard.

Today's modern Islamic legal scholars are adopting a variety of methodological approaches in order to circumvent the narrow restrictions placed on their work by classical Islamic scholarly tradition and the literal adherence to source texts which its exegesis demands. Reference to the history of Islam and the historicisation of certain sharia legal concepts is being used as a basis for interpretative initiatives, not in the sense that Islam should be abandoned as a point of reference, but rather that inspiration should again be drawn from its core and that the law should be moved closer to its original intent of achieving justice.[46] One view put forward in this context is that the density of family-law texts in the Quran demonstrates its efforts to grant women a stronger position than that which they had in pre-Islamic times: 'The principal sources of the sharia and Islamic family laws, the Quran and Sunna, represent progressive values – the legal regulations that are extrapolated from both these sources advocate, in particular, welfare of women and children'[47] It is indeed paradoxical that, at the time of Islamic revelation, the very verses and regulations which are currently at the centre of criticism and contestation in fact heralded a revolution. From a historical perspective, religious Islamic sources should be viewed against the background of pre-Islamic times, which Muslims call the *jahiliya* or 'time of ignorance'. One of the essential objectives of Islam's message was to bring about a significant improvement in the status of women and to establish the family as the core constituent unit in society. It was this which ushered in the transformation from a tribal culture to a family-based structure, in the course of which protecting the members of a family became the paramount imperative. For the first time, women were accorded legal personality and legal rights, and ceased to be treated as chattels. Specific rights granted to them included that of owning and having charge over property. Women were also granted inheritance rights. The bride's consent became a prerequisite for marriage. Islam forbade the killing of newborn baby girls, a practice which had been widespread in pre-Islamic times. Polygamy was restricted. Some restrictions were also placed on the divorce rights which husbands had enjoyed in pre-Islamic times and wives were also granted certain separation rights of their own. Dowers were to be paid to the wife and no longer to her tribe. Finally, women were granted the same status as religious be-

[45] See M. ROHE, Das Islamische Recht. Geschichte und Gegenwart 209, 214, 226 (2009); for a comparative review encompassing several countries, see WELCHMAN, supra note 15, passim; ESPOSITO & DELONG-BAS, supra note 16 at 47. Important material on this can also be found in AN-NA'IM, supra note 15 at 26, 40, 67, 93, 153, 191, 204, 247, 284.

[46] For a groundbreaking contribution to this debate, see for example AN-NA'IM, Human Rights in Cross-Cultural Perspectives. A Quest for Consensus (1992); N. ABU ZAYD, Reformation of Islamic Thought. A Critical Historical Analysis (2006); A. WADUD, Qur'an and Woman. Rereading the Sacred Text from a Woman's Perspective (1999). Regarding various modern hermeneutic interpretations, cf. BÜCHLER, supra note 38 at 200.

[47] J. REHMAN, The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq, 21 International Journal of Law, Policy and the Family 108-127, 113 (2007). Cf. also COULSON, supra note 13 at 14.

lievers as men.[48] Admittedly, the reforms ushered in by Islam served less to turn existing social order on its head than to place as many restrictions on the customary laws which had prevailed in pre-Islamic times as the society of the day was prepared to accept and understand. The degree of detail in which certain verses of Islamic family law are formulated is largely a reflection of the efforts being made at that time to provide women with effective protection. However, it is precisely this density of regulation which is proving a constant hindrance to the ongoing development of family law towards greater gender equality – unless, of course, the Quran is read in its historic context, based on its spirit of introducing a gradual and progressive change to the status of women in the context of the transition from a tribal to an Islamic society, as its ideals anticipated. Many Islamic legal scholars emphasise that the basic ethical norm of the Quran is equality between the sexes.[49]

II. Part Two: International framework

While child marriage is widespread in the Arab and Islamic world it is also commonly encountered elsewhere as well.[50] Marriages involving very young spouses are frequently concluded in the light of financial, property or relationship considerations and in order to secure not only the child's but also the family's interests.[51] They are often more rooted in local customary traditions than in classical Islamic law, especially in rural areas.[52] Since extra-marital relationships are strictly forbidden in Islam, marriage relieves the father of a girl of his duty to protect her chastity and thus the honour of the family.[53] Child marriages are also commonly seen as a means of elongating marital life and thus enhancing procreation.[54]

However, there is a growing international consensus that child marriages need to be eradicated, and this consensus finds expression in international law.[55] Child marriages deprive children, and especially girls, of the opportunity to gain a proper education and thus make it impossible for them to pursue a professional career.[56] They are not allowed to experience real childhood and adolescence, but are expected to take over familial responsibility at a very early age.[57] From a medical point of view, there are also major concerns about girls getting married when they are still very young. First, the risks of complications during pregnancy and child-

[48] Quran, sura 33, verse 35.

[49] Cf. the numerous detailed references in S. S. ALI, Gender and Human Rights in Islam and International Law. Equal before Allah, Unequal Before Man? 50 (2000).

[50] According to the latest available demographic surveys, more than 51 million girls between the ages of 15 and 19 are currently married worldwide. However, there is also a high estimated number of unknown cases as the underlying statistics do not contain any information on girls younger than 15 years, see Human Rights Watch, „How Come You Allow Little Girls to Get Married?", Child Marriage in Yemen, 2011, 15, available at: http://www.hrw.org/reports/2011/12/07/how-come-you-allow-little-girls-get-married [16 November 2012].

[51] See I. SCHNEIDER, supra note 35 at 224 et seq.; SHAHAM, supra note 18 at 45; BÜCHLER, supra note 20 at 30. See also UNICEF Innocenti Research Centre, Early Marriage. Child Spouses, 7 Innocenti Digest 1, at 6 (2001), available at: www.unicef-irc.org/publications/pdf/digest7e.pdf [16 November 2012]; Human Rights Watch, supra note 50 at 16.

[52] Cf. KAMALI, supra note 35 at 109; Human Rights Watch, supra note 50 at 15 et seq.

[53] See EL ALAMI, supra note 19 at 51; PEARL & MENSKI, supra note 32 at 153. See also ESPOSITO & DELONG-BAS, supra note 16 at 14 and UNICEF Innocenti Research Centre, supra note 51 at 6.

[54] See UNICEF Innocenti Research Centre, supra note 51 at 2.

[55] However, the practice has not fully disappeared yet, see UNICEF Innocenti Research Centre, supra note 51 at 5.

[56] See Y. ERTÜRK, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences of 23 June 2009, A/HRC/11/6/Add.6 at 46, available at: www2.ohchr.org/english/issues/women/rapporteur/docs/A.HRC.11.6.Add.6.pdf [16 November 2012]; UNICEF Innocenti Research Centre, supra note 51 at 11.

[57] Cf. Human Rights Watch, supra note 50 at 16.

birth are much higher when physical maturity has not yet fully developed.[58] Second, most adolescents are not familiar with methods of contraception or protection against sexually transmitted diseases.[59] Third and most importantly, children can be severely traumatised by early sexual experiences, particularly when these are unwanted. Beyond this, it is a proven fact that minor girls tend to fall victim to domestic violence far more often than grown-up women.[60]

Given the importance and sensitive nature of this matter, there have been numerous attempts to define minimum age standards for marriage through international agreements. However, since there is no universal understanding of what constitutes marriage, it is virtually impossible to establish principles and rules which command universal approval and observance. These difficulties are reflected in the international treaties on the subject, which often either fail to set an exact age limit for marriage or else circumscribe it in a rather vague manner. Other conventions, such as the Convention on the Rights of the Child[61], do not address the matter at all.[62]

Article 16 of the Universal Declaration of Human Rights[63] credits men and women of full age the right to marry, while failing to give any indication as to the exact age at which this full age is reached. Likewise, Article 23 of the International Covenant on Civil and Political Rights[64] calls for both spouses to be of marriageable age, but without further specification. Article 16 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)[65] declares child marriages invalid and urges the state parties to implement a minimum age for marriage, yet remains silent with regard to what constitutes an appropriate minimum age for marriage. Even article 2 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages[66] does not itself establish a clear age limit but calls on the signatory states to do this themselves.[67] Article 11 of the Convention on Celebration and Recognition of the Validity of Marriages[68] does not mention a minimum age as a precondition of a valid marriage but relies on the mental capacity and free will of the spouses, as does article 10 of the International Covenant on Economic, Social and Cultural Rights[69]. A more decisive approach was adopted in 1965 by the United Nations High Commissioner for Human Rights, who restricted marriage to age 15 and above, albeit with the option of earlier marriage in exceptional cases.[70]

[58] See UNICEF Innocenti Research Centre, supra note 51 at 10 et seq.; L. DAVIDS, Female Subordination Starts at Home: Consequences of Young Marriage and Proposed Solutions, 5 Regent Journal of International Law 299, at 300 (2007) ; Human Rights Watch, supra note 50 at 16.

[59] See H. RASHAD & M. OSMAN & F. ROUDI-FAHIMI, Marriage in the Arab World 3 (2005), available at: www.prb.org/pdf05/MarriageInArabWorld_Eng.pdf [16 November 2012], and DAVIDS, supra note 58 at 300.

[60] See DAVIDS, supra note 58 at 300; UNICEF Innocenti Research Centre, supra note 51 at 12; Human Rights Watch, supra note 50 at 16.

[61] 1989 Convention on the Rights of the Child, 1577 UNTS 3.

[62] Art. 1 of the convention reads: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

[63] GA Res. 217 A (III), 10 December 1948.

[64] 1966 International Covenant on Civil and Political Rights, 999 UNTS 171.

[65] 1979 Convention on the Elimination of all Forms of Discrimination against Women, 1249 UNTS 13. With the exception of Iran, all of the Arab states in question have ratified this convention. When looking at the national level in Part Three this essay will pay special attention to how the states deal with the convention. The CEDAW is a good example of the collision of international and national - or rather cultural - values and the corresponding difficulties of implementation.

[66] 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 521 UNTS 231.

[67] As a matter of fact, none of the five Arab states examined in this essay are state parties.

[68] 1978 Convention on Celebration and Recognition of the Validity of Marriages, 1901 UNTS 131. Egypt is the only one of the five Arab states surveyed that has ratified this convention. However, it has yet to come into force there.

[69] 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3.

[70] Principle II of the Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, GA Res. 2018 (XX), 1 November 1965.

III. Part Three: Marriage age in contemporary Muslim family laws

1. Morocco

a) Attempts at unification

Formerly a French and Spanish protectorate, Morocco gained independence in 1956. The pre-existing multi-faceted legal system proved to be the main obstacle to the creation of a modern nation state. Prior to 1956, Islamic law was predominant in certain regions of the protectorate only, whereas large parts of the population with an indigenous Berber background had developed distinct customary rules over the centuries.[71] Whilst the Arab population almost entirely followed the Maliki school of legal thought, the tribal population, though religiously committed to Islam, followed separate customary traditions as far as the law was concerned, particularly in civil-law matters,.[72] These usages were not perceived as a departure from Islamic law but rather as an integral part of it, since the sharia, though not providing a textual basis for them, abstained from an explicit ban.[73] As a result, the Moroccan legal system was two-tiered.[74] Rather than challenging this bifurcation in legal practice, the French authorities governing the protectorate encouraged tribal self-administration.[75]

Moroccan nationhood marked the beginning of a thorough process of codification driven by the ambition to harmonise the diverging Arab and Berber practices and create an Islamic state.[76] A reform of the justice sector divested the tribal authorities of the right to self-administration and mandated the application of official statutory law.[77] The newly enacted statutory law was largely based on the French model, while the scope of application of the sharia was limited to inheritance and family-law matters.[78] Statutory codification of family law did not take place until the promulgation of the so-called Moudawana, the national family-law code, in 1958.[79] The code harked back to the core values of sharia, while drawing strongly on Maliki legal thought for its basis. As a result, not only were the provisions of the code largely

[71] See G. H. BOUSQUET, Islamic Law and Customary Law in French North Africa, Vol. 32 No. 3 Journal of Comparative Legislation and International Law, Third Series 57-65, at 57 et seq., 61 et seq. (1950).
[72] See BOUSQUET, supra note 71 at 61 et seq.
[73] See L. ROSEN, Law and Custom in the Popular Legal Culture of North Africa, Vol. 2 No. 2 Islamic Law and Society 194-208, at 194 et seq. (1995); cf. the statement of King Muhammad I of 1958 cited by J. N. D. ANDERSON, Reforms in Family Law in Morocco, Vol. 2 No. 3 Journal of African Law 146-159, at 146 et seq. (1958).
[74] See BOUSQUET, supra note 71 at 61 et seq.
[75] Cf. B. VENEMA & A. MGUILD, Access to Land and Berber Ethnicity in the Middle Atlas, Morocco, Vol. 39 No. 4 Middle Eastern Studies 35-53, at 41 (2003). In 1930, a French decree referred to as the Berber Dahir and signed by the Moroccan sultan explicitly sanctioned the application of customary Berber law by tribesmen, cf. W. A. HOISINGTON JR., Cities in Revolt: The Berber Dahir (1930) and France's Urban Strategy in Morocco, Vol. 13 No. 3 Journal of Contemporary History 433-448, at 433 et seq. (1978). Only penal law was standardised for both Arab and Berber speaking territories, see BOUSQUET, supra note 71 at 61.
[76] See L. BUSKENS, Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere, Vol. 10 No. 1 Islamic Law and Society 70-131, at 72 (2003).
[77] Cf. VENEMA & MGUILD, supra note 75 at 41.
[78] Cf. also L. BUSKENS, Sharia and National Law in Morocco, in J. M. Otto (Ed.), Sharia Incorporated. A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present 89-138, at 131 (2010).
[79] An electronic French version of the document is available at: http://perso.menara.ma/~lezbare/ [16 November 2012].

modelled on Maliki teachings,[80] but Maliki jurisprudence was also declared the only applicable source of law in all cases where no statutory provisions had been formulated.[81]
A telling example of the strong Maliki influence on the Moudawana can be seen in article 12, paragraph 1, which established guardianship in marriage by denying women of full legal capacity the right to enter into marriage without a guardian's approval.[82] Other provisions, however, such as article 8, did not entirely correspond with classical Maliki teaching. That article defined the minimum marriageable age as 15 years for females and 18 years for males, while bestowing on the courts the power to permit marriage at an earlier age in cases of hardship. In contrast, the classical Maliki school sets minimum marriageable age at 17 years for both sexes.[83] According to the Moudawana, minor children of either sex could be given into marriage by their fathers and minor female children could even be forced to marry by parental constraint.[84] Prior to the enactment of the Moudawana, based on classical Maliki law, a father had had the power to force his virgin daughter into marriage even after she had reached puberty. The code limited this option to cases in which there was deemed to be a danger of immoral behaviour on the daughter's part and made its granting subject to judicial approval.[85] Furthermore, the code also introduced the mandatory registration of marriage and divorce.[86] Although their opposition to the new code ultimately proved unsuccessful, tribal authorities perceived it as an undue intrusion and an unwarranted attempt at unification by the state.[87]
In the context of under-age marriage, another relevant piece of legislation enacted during this period was the Moroccan Penal Code of 1963, which, except for some minor revisions carried out in 1967, is still in force in its original form today. This code criminalises rape and both consensual and violent sexual activity involving minors.[88] Consensual sexual activity with minors is, however, exempted from prosecution on condition that the culprit marries the victim.[89] The ulterior motive of this provision is to secure both the victim's and the family's honour.[90] Thus, minors who fall victim to non-violent sexual actions can be married off to the offender, provided that the minor's guardian seeks court approval of the marriage and this approval is granted by the court. Once the marriage has taken place, criminal investigation can be initiated only by a person empowered to demand the annulment of the marriage. Usually, that person would be the minor's guardian, and no criminal investigation can commence until the marriage has been judicially annulled.[91]

[80] Cf. the statement of King Muhammad I of 1958 cited by Anderson, supra note 73 at 146 et seq.; BUSKENS, supra note 76 at 73.
[81] See BUSKENS, supra note 76 at 72 et seq.
[82] See BUSKENS, supra note 76 at 74.
[83] See ANDERSON, supra note 73 at 148 et seq., footnote 3; BUSKENS, supra note 76 at 74; MIR-HOSSEINI, supra note 16 at 26. For the Maliki position see Part One, II.
[84] Art. 12 Para. 4 of the Moudawana of 1958.
[85] Art. 12 Para. 4 of the Moudawana of 1958. See also ANDERSON, supra note 73 at 149 et seq.; NASIR, supra note 18 at 50; WELCHMAN, supra note 15 at 64.
[86] See MIR-HOSSEINI, supra note 16 at 26.
[87] Cf. VENEMA & MGUILD, supra note 75 at 44, 50.
[88] Art. 484 to 486 of the Penal Code of 1963, as amended in 1967. An electronic French version of the document is available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=190447 [16 November 2012].
[89] Art. 475 of the Penal Code.
[90] See Human Rights Watch, Morocco: Girl's Death Highlights Flawed Laws, 23 March 2012, available at: http://www.hrw.org/news/2012/03/23/morocco-girl-s-death-highlights-flawed-laws [16 November 2012].
[91] Art. 475 of the Penal Code. See Human Rights Watch, supra note 90.

b) Minor reform in 1993

The 1990s were marked by political, intellectual and economic liberalisation and the public emergence of women's rights activist groups.[92] Mounting calls for a reform of the Moudawana coincided with increasingly forceful discussion of human rights in a more general sense. Activists' major concerns were the abolition of guardianship in marriage and an increase in the marriageable age for females from 15 to 18 years. Notwithstanding the harsh opposition from religious and conservative camps, the Moudawana underwent some important changes in 1993. The revised code deviated from the classical Maliki opinion in that it made the validity of a marriage conditional on the woman's explicit consent while at the same time revoking a father's previous compulsorily held right to conclude a marriage contract against his daughter's will.[93] However, the reform left both the fundamental institution of guardianship in marriage and the issue of marriageable age untouched.[94]

c) The 2004 reform

Around the turn of the twenty-first century, modernisation of Moroccan family law was the principal subject of debate between reformers and traditionalists. In October 2003, the King announced a landmark reform of the Moudawana which was adopted by the Morrocan parliament in 2004.[95] Since this revised Moudawana came into force, the marriageable age has been set at 18 years for both sexes.[96] Marriage below this age remains permissible, but is contingent upon judicial authorisation. Permission is granted if there are legitimate grounds justifying the marriage, and these grounds must be determined by the courts based on the opinions of the parents or the guardian of the minor spouse and on the outcome of a medical evaluation or a social inquiry.[97] Guardianship in marriage is now abolished and women also have the right to enter into matrimony without intermediation.[98] Proof of marriage is generally established by an officially registered and valid marriage contract.[99] However, claims relating to unregistered marriages can be judged by the courts taking into account all legal evidence and expertise and paying special attention to any pregnancies or children arising from such marriages.[100]

Non-recognition of an unregistered marriage by the courts may have severe implications especially for the children of the marriage concerned, as they are equated with children born out of

[92] See BUSKENS, supra note 76 at 104; K. ŽVAN, The Politics of the Reform of the New Family Law (the Moudawana) 48 (2007); F. HARRAK, The History and Significance of the New Moroccan Family Code, 09-002 Working Paper Series of the Institute for the Study of Islamic Thought in Africa 1, at 2 (2009), available at: www.cics.northwestern.edu/documents/workingpapers/ISITA_09-002_Harrak.pdf [16 November 2012].

[93] Art. 5 Para. 1 and Art. 12 Moudawana of 1993.

[94] See HARRAK, supra note 92 at 3.

[95] See B. MADDY-WEITZMAN, Women, Islam, and the Moroccan State: The Struggle Over the Personal Status Law, Vol. 59. No. 3 Middle East Journal 393, at 406 (2005); K. ZOGLIN, Morocco's Family Code: Improving Equality for Women, 31 Human Rights Quarterly, 964-984, 969 (2009). In contrast to the 1993 revision, the Moudawana of 2004 was not put into force by royal decree. King Muhammad IV strove towards a reform of family law that was acceptable to all, thus making parliamentary enactment a better basis of legitimation.

[96] Art. 19 Moudawana of 2004. See also BUSKENS, supra note 76 at 114 et seq.; M.-C. FOBLETS & J.-Y. CARLIER, Le Code Marocain de la Famille. Incidences au Regard du Droit International Privé en Europe 25 (2005); NASIR, supra note 18 at 57; HARRAK, supra note 92 at 7. An electronic version of the document is available at: http://www.globalrights.org/site/DocServer/Moudawana-English_Translation.pdf [19 August 2011].

[97] Art. 20 Moudawana of 2004. The marriage authorisation petition must be signed by both the minor and his or her tutor, cf. art. 21 Moudawana of 2004.

[98] Art. 12 Para. 4 and Art. 25 Moudawana of 2004. According to Art. 24 a woman still has the right to delegate this power to a tutor of her choice.

[99] Art. 16 Para. 1 of the Moudawana of 2004.

[100] Art. 16 Paras. 2 and 3 of the Moudawana of 2004. Cf. also WELCHMAN, supra note 15 at 57.

wedlock. As a consequence, they will not be registered in the civil status records, which will affect their inheritance and custody rights and may even deny them access to public health care and education. Moreover, non-registration of a marriage is effectively tantamount to circumvention of protective legal standards such as minimum age restrictions.

The 2004 revision of the Moudawana has brought about substantial reforms in family law and has considerably loosened the law's previously strict adherence to classical Maliki principles. Meanwhile, however, the broad enthusiasm this progressive reform initially earned has now largely worn off and its actual implementation has proven far from adequate for a number of reasons. First, shortcomings in implementation are closely linked to the central role assigned to the judiciary in family-law matters under the revised law. The new legislation leaves questions of great social importance to the courts' discretion. Judges often feel overwhelmed by their lack of training and resources in the face of the new expectations placed upon them.[101] Some are even unwilling to apply the new law correctly, because it is contradictory to their personal perceptions of marriage and the family, and it is for this reason that an increasing number of judgments are still issued based on classical Maliki law.[102] Most notably, judges tend to handle the conditions stipulated by article 20 of the 2004 Moudawana far too generously, often granting approval of under-age marriages in cases where the requirements for such approval are not in fact met. Second, deficiences in the implementation of statutory law in this area can also be attributed to insufficient awareness of the new legal situation among the public at large, particularly among the tribal population.[103] Third, the inefficacy of the statutory law also stems from its insensitivity to specific regional or tribal customs and practices. Since their defining purpose is to achieve unification, the new statutory provisions have made little effort to incorporate customary practices and rules into official law. This has given rise to feelings that the new law does not pay sufficient heed to people's needs and concerns and has also raised questions of legitimation, thus widening the gap between statutory and customary law. A good example in this regard is the problem of marriage registration. Today, many marital alliances are not officially recorded simply because registration is not a prerequisite for the validity of a marriage either under classical Islamic law or under customary law. When the new Moudawana came into force in 2004, preventing the non-registration of marriages was considered an imperative. Accordingly, the revised code offered a procedure for the retroactive registration of marriage but limited its applicability to a five-year period commencing on the date on which the new law came into force.[104] While the code did thus make some attempt take practical realities into account, it failed to acknowledge the fact that tribal concepts of marriage do

[101] See K. ZOGLIN, supra note 95 at 978 et seq.

[102] See K. ZOGLIN, supra note 95 at 978. This is so despite the fact that Art. 400 of the Moudawana allows courts to resort to classical Maliki jurisprudence only if a specific question was left unaddressed by the code.

[103] See K. ZOGLIN, supra note 95 at 982 et seq.; International Foundation for Electoral Systems & Institute for Women's Policy Research, The Status of Women in the Middle East and North Africa Project. Focus on Morocco. Opinions on the Family Law and Gender Quotas, at 2 (2010), available at: http://www.ifes.org/~/media/Files/Publications/Papers/2010/swmena/2010_Morocco_Quotas_and_Family_Law_English.pdf [17 August 2011].

[104] The Preamble of the Moudawana of 2004 enumerates the fundamental points of the reform. Para. Nine of the Preamble reads: 'Protect the child's right to acknowledgement of paternity in the event the marriage has not been officially registered for reasons of force majeure, where the court examines the evidence presented to prove filiation, and establish a five-year time limit for settling outstanding cases in this regard to put an end to the suffering endured by children in this situation.' Likewise, Art. 16 Para. 4 Moudawana of 2004 states that during this period of time petitions for recognition of marriages can be filed. The procedure was open both to marriages acknowledged by both partners and unilaterally contested marriages. For the latter, the Ministry of Justice's guide to the revised Moudawana stated that for the verification of the contested marriage all kinds of proof were admitted, see WELCHMAN, supra note 15 at 57 et seq.

not involve registration. This approach was not well received by the Berber population and, despite numerous awareness campaigns conducted by the government and human rights NGOs, the deadline for retroactive registration has now expired without bringing about significant changes to marriage practices in rural areas.[105]

In summary, the effectiveness of the Moudawana is impaired by a number of factors which also tend to encourage the occurrence of under-age marriages. Currently, it is estimated that under-age marriages account, on average, for about ten percent of all marriages concluded in Morocco and that in rural areas this percentage is even higher.[106] The latest official data were collected in a census carried out in 2003/2004. According to these evaluations, approximately 10 percent of women aged between 15 and 19 were married in 2004.[107] 7.9 percent of women aged 25 to 49 and 1.6 percent of women aged 15 to 19 in 2004 were 15 years old at the time of their first marriage; 6 percent of women aged 20 to 24 in 2004 had either been married or in informal union[108] before the age of 18.[109] It should however be borne in mind that this census was conducted at the same time as the 2004 Moudawana reforms came into force. It cannot therefore be regarded as representative of the current situation and does not, by definition, reflect the practical changes the reform has since achieved.

Another complex set of problems can be found in the field of criminal law. As stated above, article 475 of the Penal Code ensures impunity for consensual sexual activity with minors if the offender later agrees to marry the victim. Although the wording of this provision explicitly limits the applicability of this remedy to non-violent sexual activity only, article 475 of the Penal Code is in fact also being applied in rape cases. In recent years, two such cases have attracted much attention in both the national and international media, since the minor victims in both cases committed suicide after being married to their tormentors, a circumstance which at the very least leaves room for doubts as to the extent to which the legal requirements for under-age marriage are in fact being observed, particularly with regard to such marriages requiring mutual consent by both spouses.[110] Dramatic incidents such as these have meant that criminal legislation in this area – which was already controversial - has drawn fervent criticicism from both domestic and international human rights activists and become a hotly debated political issue. It has not only prompted calls for an alteration of the Penal Code, but was also the motivation for the drafting of a new law prohibiting violence against women which is currently awaiting min-

[105] Cf. K. ZOGLIN, supra note 95 at 982 et seq. (2009).

[106] Cf. H. FASSI-FIHRI, It's Time for Additional Reforms, in H. Fassi-Fihri & Z. Tahiri (Eds.), Perspectives: Morocco's Family Code, 5 Years Later (2009), available at: www.commongroundnews.org/article.php?id=25395&lan=en&sp=0 [16 November 2012].

[107] Cf. United Nations Department of Economic and Social Affairs, Population Division, World Marriage Data 2008 on Marital Status, available at: http://www.un.org/esa/population/publications/WMD2008/Main.html [16 November 2012] (10.7 percent); Ministère de la Santé, Enquête sur la Population et la Santé Familiale 2003-2004, at 83, available at: http://www.measuredhs.com/Publications/Publication-Search.cfm?ctry_id=27&c=Morocco&Country=Morocco&cn=Morocco [16 November 2012] (10.5 percent).

[108] According to an explanation given by UNICEF, the term 'in union' refers to informally concluded, i.e. non-registered marriages.

[109] See Ministère de la Santé, supra note 107 at 83 et seq.; UNICEF Database on Child Marriage which was last updated in February 2011, available at: http://www.childinfo.org/marriage_countrydata.php [16 November 2012].

[110] See Human Rights Watch, supra note 91; A. Maghri, In Morocco, the Rape and Death of an Adolescent Girl Prompts Calls for Changes to the Penal Code, available at: http://www.unicef.org/infobycountry/morocco_62113.html [16 November 2012]; http://www.equalitynow.org/take_action/discrimination_in_law_action411 [16 November 2012]. By virtue of public statements, the original allegation of rape had been withdrawn by the victim, which enabled criminal exoneration through consensual marriage under the terms of art. 475 of the Penal Code.

isterial review and has not yet been presented to parliament.[111] For the time being, however, the present provision will remain in force.[112]

d) CEDAW

Morocco ratified the CEDAW in 1993, but did not publish the text of the convention in the official Moroccan law gazette until 2001.[113] At the time of ratification, the government expressed reservations with regard to articles 2[114], 9[115], 15[116] and 16 of the convention. These reservations made it very clear that the government was unwilling to give precedence to the CEDAW in cases where its provisions conflicted with sharia law. Given the significance of the articles in question, these reservations effectively deprived Morocco's ratification of the convention of any practical consequences. In December 2008, King Muhammad IV announced the retraction of the reservations to the CEDAW and these were then formally withdrawn in April 2012.[117]

2. Egypt

a) Early codifications of personal status law

Even after the country's independence from the British authorities in 1922, Egypt's legal system continued its process of gradual assimilation. The Islamic principles on which it had mainly been based were now progressively displaced by a somewhat secular European civil law system.[118] Personal status law, conversely, remained uncodified until 1920.[119]

Previously, towards the end of the nineteenth century, child marriages were quite a common and widespread phenomenon, particularly in Egypt's rural areas. At the turn of the twentieth century, increased public awareness of the physical and psychological risks of early marriage triggered a wave of statutory efforts to curb the practice.[120] The first such attempt was a draft bill referred to the legislative assembly in 1914 recommending 16 as the minimum marriageable age for girls and punishing parents, guardians and husbands for arranging under-age marriages.[121] Although this bill was later rejected, it was soon followed by an alteration of the Egyptian Penal Code under which the consummation of a marriage with a girl younger than 12

[111] See The Human Rights Warrior of 15 March 2012, Amina Filali and Violence Against Women in Morocco, available at: http://open.salon.com/blog/the_human_rights_warrior/2012/03/15/amina_the_face_of_violence_against_women_in_morocco [16 November 2012].

[112] See Human Rights Watch, supra note 91.

[113] See BUSKENS, supra note 76 at 109; Association Démocratique des Femmes du Maroc of 15 December 2008, The Withdrawal of the Reservations to CEDAW by Morocco, available at: http://www.adfm.ma/spip.php?article695&lang=en [16 November 2012].

[114] Art. 2 embodies the basic ideas and principles of the CEDAW.

[115] Art. 9 grants a mother the right to transmit her nationality to her child. Morocco has never formally withdrawn this reservation but in 2007 enacted a law allowing for the transmission of nationality from the mother to the child, see BUSKENS, supra note 76 at 127.

[116] Art. 15 calls for equality between the sexes and Art. 16 prohibits discrimination relating to marriage and family relations.

[117] Cf. Amnesty International, Annual Report 2012. Morocco/Western Sahara, 24 May 2012, available at: http://www.unhcr.org/refworld/country,,,,ESH,456d621e2,4fbe3923c,0.html [16 November 2012]; BUSKENS, supra note 76 at 127.

[118] See M. BADRAN, Feminists, Islam, and Nation: Gender and the Making of Modern Egypt 124 and 181 (1996). See also L. ABU-ODEH, Egyptian Feminism: Trapped in the Identity Debate, 16 Yale Journal of Law and Feminism 145-192, at 146 (2004) and ESPOSITO & DELONG-BAS, supra note 16 at 47.

[119] See T. MAHMOOD, Statutes of Personal Law in Islamic Countries: History, Texts and Analysis, 2nd Edition 10 (1995).

[120] See B. BARON, The Making and Breaking of Marital Bonds in Modern Egypt, in N. R. Keddie & B. Baron (Eds.), Women in Middle Eastern History: Shifting Boundaries in Sex and Gender 275-291, 281 (1991).

[121] See A. THOMPSON, The Woman Question in Egypt, Vol. 4 No. 3 Moslem World 266-272, 266 (1914).

years old was classified as rape.[122] Under this new provision the validity of the marriage as such was not affected by the crime of rape, however.[123]

Between 1920 and 1931 a series of personal status laws was passed. While, in purely formal terms, the new laws had much in common with European laws in this area, they embodied rules mostly derived from the Islamic principles of the Hanafi school of thought.[124] To some extent, however, the new legislation also had the effect of reforming the Islamic legal framework from within inasfar as it also drew on a number of rulings from other schools of Islamic law or combined them with Hanafi interpretations.[125] In cases where there was no applicable statutory law, courts were instructed to apply the Hanafi doctrine.[126]

The two main problems addressed by the new legislation were child marriages and non-registration of marriage. Child marriages were counteracted by denying court access to marriage-related claims in cases where the marriage had been concluded with a female below 16 or a male below 18 years of age.[127] Accordingly, civil registry offices were also urged not to register marriages involving under-age spouses.[128] Claims arising from unregistered, so-called *'urfi* marriages were likewise denied a judicial hearing except in cases where the marriage was not contested by any of the parties concerned.[129]

Remarkably, as a concession to classical Hanafi opinion, the legal validity of marriages concluded in violation of age or registration requirements was left unchallenged by the legislators.[130] This opened the door for severe abuses such as depriving spouses of their matrimonial rights or alleging non-existant claims.[131]

A new law passed in 1931 reaffirmed the legislative steps taken with regard to child marriages and non-registration of marriage in the foregoing decade. The age requirements for marriage were maintained, though the relevant point in time for determining the spouses' ages was shifted from the time of the conclusion of the marriage to the time of the court hearing.[132] Unregistered marriages also remained outside the courts' jurisdiction, since official documents were deemed to be the only authoritative documentary evidence of marriage.[133] Furthermore,

[122] Cf. A. C. MCBARNET, The New Penal Code: Offenses against the Morality and the Marriage Tie and Children, Vol. 10 No. 46 L'Egypte Contemporaine, 382-386 (1919) as cited by B. BARON, supra note 120 at 281.

[123] See SHAHAM, supra note 18 at 54.

[124] See M. BADRAN, Competing Agenda: Feminism, Islam and the State in Nineteenth- and Twentieth-Century Egypt, in D. Kandiyoti (Ed.), Women, Islam and the State 201, at 201 (1991); M. F. HATEM, Secularist and Islamist Discourses on Modernity in Egypt and the Evolution of the Postcolonial Nation-State, in Y. Yazbeck Haddad & J. L. Esposito (Eds.), Islam, Gender, and Social Change 85, at 89 (1998); ABU-ODEH, supra note 39 at 1101 et seq.; ESPOSITO & DELONG-BAS, supra note 16 at 47.

[125] So-called doctrine of supra-madhab, see ABU-ODEH, supra note 39 at 1091; R. SHAHAM, Custom, Islamic Law, and Statutory Legislation: Marriage Registration and Minimum Age at Marriage in the Egyptian Shari'a Courts, Vol. 2 No. 3 Journal of Islamic Law and Society, 258-281, 260 (1995).

[126] Art. 280 Law No. 78 of 1931. See M. BERGER & N. SONNEVELD, Sharia and National Law in Egypt, in J. M. Otto (Ed.), Sharia Incorporated. A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present 51, at 74 (2010) and M. BERGER, Secularizing Interreligious Law in Egypt, Vol. 12 No. 3 Journal of Islamic Law and Society, 394-418, at 397, 410 (2005).

[127] Art. 1 Law No. 56 of 1923. Cf. EL ALAMI, supra note 29 at 198 et seq.; BARON, supra note 120 at 281.

[128] See ESPOSITO & DELONG-BAS, supra note 16 at 50; BARON, supra note 120 at 281 et seq.; WELCHMAN, supra note 15 at 62.

[129] Art. 1 Law No. 56 of 1923. See BÜCHLER, supra note 20 at 27 et seq.; SHAHAM, supra note 125 at 266.

[130] Cf. SHAHAM, supra note 125 at 264, 266.

[131] See for instance the examples given by SHAHAM, supra note 18 at 57 et seq.

[132] Art. 99 Para. 5 and Art. 367 Law No. 78 of 1931 and Art. 33 Regulations for Marriage Officials issued in accordance with Law No. 78 of 1931. Cf. SHAHAM, supra note 125 at 263; E. FAWZY, supra note 1 at 42 et seq.

[133] Art. 99 Law No. 78 of 1931. Cf. WELCHMAN, supra note 15 at 56.

under the 1931 legislation, the guardian's consent, as required by classical Hanafi doctrine, was not defined as a precondition for the validity of a marriage contract.[134]

With regard to its reception by the judiciary, the new legislation was supported by the majority of judges while a minority pursued a very narrow interpretation of the new provisions in order to limit their scope of application.[135] In practical terms, however, implementation of these reforms proved to be a very cumbersome endeavour, since it was not uncommon for birth certificates either not to exist or to be forged and because the new laws were resisted by large swathes of the population. Furthermore, registry office officials frequently took advantage of the fact that infringements of the new law were rarely prosecuted and simply refused to comply with the new standards.[136]

b) Recent reforms

The legal framework established by the 1931 legislation regulating under-age marriages and marriage registration endured for a long time. Family law was not included in the national Civil Code that came into force in 1948.[137] Similarly, in 1971, although calls for an increase in the marriageable age to 18 years for girls and 21 years for boys were put forward for discussion when Egypt's new constitution was being drafted, these proposed changes were not in fact included in the final draft.[138]

It was only as recently as 2000 that marriage registration again became the focus of public attention – in the context of a far-reaching set of reforms to Egyptian divorce law.[139] In many respects the new law resembles its predecessor, particularly since it also denies court access to claims arising from unregistered marriages. However, the most important discrepancy between the new law and its 1931 predecessor lies in the fact that the new law allows for the judicial admissibility of divorce claims relating to unregistered marriages, provided that there is some sort of documentation of the marriage having occurred.[140] Although there were fears that this partial legitimisation of *'urfi* marriages would encourage secret marriages and the circumvention of the law,[141] legislators opted for their limited recognition because their previous judicial exclusion had, in practice, been a cause of major iniquities.[142] In addition to its provisions regarding registration of marriage, the new law also reconfirmed the minimum marriageable ages of 16 years for females and 18 years for males originally set in 1931.[143] With the exception of the minimum marriageable age for females which, as a result of a more recent reform enact-

[134] For an extensive discussion see EL ALAMI, supra note 29 passim.

[135] See SHAHAM, supra note 125 at 276.

[136] See SHAHAM, supra note 125 at 275; MOUSSA J., Competing Fundamentalisms and Egyptian Women's Family Rights. International Law and the Reform of Shari'a-derived Legislation, 166 (2011).

[137] The Civil Code was drafted under the leadership of the nationalist secular movement. At first, the drafters intended to include a section on personal status law in the code in order to reconcile religious tradition and reformist progress, but the project was eventually dropped, see ABU-ODEH, supra note 39 at 1097 et seq.

[138] See ESPOSITO & DELONG-BAS, supra note 16 at 58.

[139] Law No. 1 of 2000.

[140] Art. 17 Para. 2 Law No. 1 of 2000, see FAWZY, supra note 1 at 69; MOUSSA, supra note 136, at 168.

[141] See FAWZY, supra note 1 at 72; SONNEVELD N., Rethinking the Difference between Formal and Informal Marriages in Egypt, in M. Voorhoeve (Ed.), Family Law in Islam. Divorce, marriage and Women in the Muslim World, 77 et seq., at 79 et seq. (2012).

[142] See the example given by FAWZY, supra note 1 at 42: If under the 1931 law a woman entered a non-registered marriage, she was not allowed to marry another man. However, due to lack of registration she would not be heard by the court if she wanted to obtain a judicial divorce, even in the event that her husband officially married another woman. She was thus trapped in the marriage. Cf. also MOUSSA, supra note 136, at 166, 168.

[143] Art. 17 Law No. 1 of 2000. Marriages involving minors were nevertheless considered valid, cf. FAWZY, supra note 1 at 69.

ed in 2008,[144] was raised to 18 years, the 2000 regulations remain in force and have recently been complemented by a ministerial decree limiting the age gap between spouses to a maximum of 25 years.[145] The 2008 reform also led to a tightening of penal law which makes it a criminal offence for both guardians and registry office officials to allow under-age marriages to take place.[146] Very recently, however, it has been rumoured that the Egyptian parliament is considering debating a reduction of the marriageable age for girls from 18 to 14 or possibly even nine years. While these rumours have raised deep concerns among human rights activists, they have not yet been officially confirmed by the government.[147]

Another problem closely entwined with under-age marriages and one which has been addressed by legislators both in 2008 and 2010 is the issue of human trafficking. Egypt is commonly reputed to be a source, transit and destination country for women and children who have fallen victim to forced labour and sex trafficking.[148] A common phenomenon in this regard is that of so-called summer marriages, i.e. temporary, commercial marriages which serve to legitimise sexual relations for a certain period of time, which have been heavily criticised by human rights activists and widely reported in the international media.[149] Such alliances - which essentially lack a basis in classical Hanafi doctrine - often involve minors, typically girls, and are generally concluded out of financial need. They are usually facilitated by the minor's parents in exchange for a commission, and occasionally rely on the aid of professional marriage intermediaries. Such arrangements not only expose the minor to sexual exploitation, but also to forced labour, as the child victims are sometimes taken back to the husband's home state to work as domestic servants.[150] The legislature has taken several steps to prevent this practice, including a tightening of the Child Law[151], alterations to the Penal Code[152] and the adoption of a comprehensive law against human trafficking in 2012[153]. Furthermore, in 2010, the government established a National Plan of Action to combat human trafficking, whose measures included the establishment of a national victim referral mechanism.[154] According to human rights

[144] Art. 31bis Law No 143 of 1994 as stipulated by Law No. 126 of 2008.
[145] Cf. F. HARRISON, Egypt Bans 92-Year-Old's Marriage, BBC News of 13 June 2008, available at: http://news.bbc.co.uk/2/hi/7452456.stm [16 November 2012].
[146] See MOUSSA, supra note 136, at 167, footnote 7, referring to the corresponding alterations of the Child Act (Law No. 12 of 1996) and the Penal Code (Law No. 58 of 1937).
[147] See http://www.equalitynow.org/take_action/child_marriage_action [16 November 2012]; http://www.trust.org/alertnet/news/egypt-new-child-marriage-laws-are-a-step-backwards [16 November 2012]; http://plan-international.org/about-plan/resources/news/egypt-new-child-marriage-laws-threaten-girls/ [16 November 2012].
[148] See United States Department of State, Trafficking in Persons Report – Egypt, 14 June 2010, 146, available at: http://www.unhcr.org/refworld/docid/4c1883f8c.html [16 November 2012].
[149] Cf. for instance http://www.dailymail.co.uk/news/article-2173796/Rich-Arab-tourists-buying-age-brides-Egypt-just-summer-3-200.html [16 November 2012]; VESELINOVIC M., Scandal of 'Summer Brides', The Independent, 15 July 2012, available at: http://www.independent.co.uk/news/world/africa/scandal-of-summer-brides-7944467.html [16 November 2012].
[150] See VESELINOVIC, supra note 149.
[151] Law No. 12 of 1996, as amended by Law No. 126 of 2008. An electronic version of the document is available at: http://www.nccm-egypt.org/e7/e2498/e2691/infoboxContent2692/ChildLawno126english_eng.pdf [16 November 2012]. Cf. for instance the right of a child to protection from all forms of violence, or injury, or physical, mental or sexual abuse as enshrined in art. 3 sec. 1 lit. a.
[152] See art. 291 of the Penal Code, Law No. 58 of 1937, added in accordance with Law No. 126 of 2008, which amongst other things criminalises the violation of the right of a child to protection from trafficking or from sexual, commercial or economic exploitation. An electronic version of the article is available at: http://www.nccm-egypt.org/e7/e2498/e2691/infoboxContent2692/ChildLawno126english_eng.pdf [16 November 2012].
[153] Law No. 64 of 2012 regarding Combating Human Trafficking. An electronic version of the document is available at: http://www.protectionproject.org/wp-content/uploads/2010/09/Egypt_TIP-Law_2010-Ar+En.pdf [16 November 2012].
[154] See United States State Department, supra note 148 at 146.

activists, however, these legislative measures have yet to be sufficiently and effectively implemented and summer marriages thus remain a problem.[155]

The most recent surveys, carried out in 2008, indicate that 17 percent of all women in Egypt aged 20 to 24 at that time had been married or in union[156] before the age of 18 and that this percentage is almost twice as high in rural areas as it is in towns and cities.[157] The proportion of women aged 15 to 19 who were married in 2008 amounted to 13.1 percent.[158] 7.4 percent of women aged 25 to 49 in 2008 had been first married at the age of 15 and 1.1 percent of women aged 15 to 19 in that same year were married by the time they were 15.[159] It is also important to note that these statistics do not include either *'urfi* marriages – which are reportedly showing a continuing upward trend[160] – or temporary marriages. From this it is clear that under-age marriages are still a widespread phenomenon in Egypt and that, despite a trend towards spouses being older when they first marry, actual implementation of the statutory law is not yet guaranteed throughout the country. Law enforcement is often frustrated by the falsification of birth certificates and corruption, despite noticeable efforts by the government to intensify its implementation of these laws, particularly with regard to criminal prosecution.[161] Another element of uncertainty in this area stems from the previously mentioned ongoing rumours of a possible significant reduction of the minimum marriageable age, though these have not yet been corroborated by the official authorities.

c) CEDAW

Egypt ratified the CEDAW in 1981, recording reservations with regard to articles 2, 9, 16 and 29[162]. The reservations to articles 2 and 16 were the only ones explicitly based on the state's commitment to the sharia.[163] Until powerful mass demonstrations forced a change of government in February 2011, this commitment to the sharia had been enshrined in article 2 of the Constitution of 1971, which declared the principles of Islamic jurisprudence to be the *principal* source of legislation.[164] In its ongoing jurisdiction, the Supreme Constitutional Court has always interpreted this provision as meaning that the sole matters which the legislature had no right to regulate were those on which *ijtihad* was prohibited.[165] Consequently, apart from the core principles of Islam, Egyptian legislators have been free to regulate based on their autono-

[155] See United States State Department, supra note 148 at 147.
[156] Cf. supra note 108.
[157] See UNICEF Database on Child Marriage, supra note 109; cf. also MOUSSA, supra note 136, at 167, footnote 10 with further information.
[158] See F. EL-ZANATY & A. WAY, Egypt Demographic Health Survey 2008 97, available at: http://www.measuredhs.com/pubs/pdf/FR220/FR220.pdf [16 November 2012].
[159] Cf. EL-ZANATY & WAY, supra note 158 at 99.
[160] See Institute of National Planning, Egypt/United Nations Development Programme, Egypt Human Development Report 2010. Youth in Egypt: Building Our Future, 3 (2010), available at: http://www.undp.org.eg/Portals/0/NHDR%202010%20english.pdf [16 November 2012].
[161] See MOUSSA, supra note 136, at 167.
[162] Art. 29 offers the possibility of arbitration for disputes between state parties to the convention.
[163] Paradoxically, Egypt has not made reservations to other provisions of the CEDAW such as Arts. 1 (discrimination in general) or 11 (discrimination in employment) which also conflict with the sharia. According to AN-NA'IM this is because in Egypt family-law matters as dealt with in Art. 16 of the convention are based on the sharia whereas nearly all other aspects of law have been modified through state legislation, cf. A. A. AN-NA'IM, The Rights of Women and International Law in the Muslim Context, 9 Whittier Law Review 491-516, at 513 (1987).
[164] Cf. the Constitution of 1971 as amended in 1980. An electronic version of the document is available at: http://www.sis.gov.eg/en/LastPage.aspx?Category_ID=208 [16 November 2012].
[165] See C. B. LOMBARDI, Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Shariah in a Modern Arab State, Vol. 37 No. 1 Columbia Journal of Transnational Law 81-124, 99 et seq. (1998/1999); A. BÜCHLER, Kinderrechte und Kindesschutz in Ägypten. Die jüngsten Reformen, 4 FamPra.ch 833-841, 835 et seq. (2008).

mous interpretation of the religious sources and without reliance on a specific scholarly exegesis.[166] Thanks to this relatively liberal understanding of the 1971 Constitution, the reservations to the CEDAW did not present a major obstacle to an effective implementation of the convention. In April 2011, the Supreme Council of the Armed Forces (SCAF), which had been in charge since the resignation of President Hosni Mubarak, adopted an Interim Constitutional Declaration. The wording of article 2 of this Declaration was almost identical to that of article 2 of the 1971 Constitution and declared the principles of Islamic jurisprudence to be the *main* source of legislation.[167] The similarity between the two provisions suggested that the interpretation which the Supreme Constitutional Court has adopted hitherto was likely to continue.
This situation changed, however, when the new constitution adopted by the Constituent Assembly came into force on 26 December 2012. It provides for a different distribution of interpretational sovereignty, declaring the principles of sharia to be the *main* source of legislation (Article 2), while at the same time vesting the power to interpret the sharia in the Al-Azhar, a prominent religious schooling institution (Article 4).[168] Human rights activists disapprove of this delegation of interpretational powers on the grounds that it would enable an unelected body to decide, without judicial review, on matters which are crucial to the future of human rights in Egypt.[169] Bearing in mind the relatively conservative orientation of the Al-Azhar, there would appear to be only a very scant possibility that the previous liberal interpretation of the CEDAW reservations will continue to hold sway.

3. Saudi Arabia

a) Supremacy of Islamic law

Unlike Morocco or Egypt, Saudi Arabia has never been subject to colonial rule. Its legal system has developed indigenously and has essentially remained unaffected by European influences. Instead, familial and tribal relations form the basis on which the state is founded and its core principles are purely religious in their origin.[170] The strong bond between the state and Islam was perhaps most tellingly expressed in a royal decree enacted in 1992 which declared the Quran and the Sunna of the Prophet to be the Saudi Arabian constitution.[171] Given the supremacy of the sharia over every man-made law, the scope for state legislation is thus considerably limited.[172] Accordingly, for the most part, Saudi Arabian law is classical Islamic law, and this is

[166] See O. ARABI, The Dawning of the Third Millennium on Shari'a: Egypt's Law no. 1 of 2000, or Women May Divorce at Will, Vol. 16 No. 1 Arab Law Quarterly 2-21, 8 et seq., 19 et seq. (2001).
[167] An electronic version of the Interim Declaration is available at:
http://www.sis.gov.eg/en/LastPage.aspx?Category_ID=1155 [16 November 2012].
[168] See the description given by Human Rights Watch, Egypt: Fix Draft Constitution to protect Key Rights, 8 October 2012, available at: http://www.hrw.org/news/2012/10/08/egypt-fix-draft-constitution-protect-key-rights [16 November 2012].
[169] See Human Rights Watch, supra note 168; Human Rights Watch, Letter to Members of the Egyptian Constituent Assembly, 8 October 2012, available at: http://www.hrw.org/news/2012/10/08/letter-members-egyptian-constituent-assembly [16 November 2012].
[170] Cf. A. AL-YASSINI, Religion and State in the Kingdom of Saudi Arabia, 83 (1985); M. FANDY, Religion, Social Structure and Political Dissent in Saudi Arabia, in A. Hourani & P. Khoury & M. C. Wilson, The Modern Middle East: A Reader, 2nd Edition 657, at 665 (2005); M. Q. ZAMAN, The Ulama in Contemporary Islam. Custodians of Change xiv (2002).
[171] Art. 1 of the Basic Law. The Basic Law (Royal Decree No. A/90 of 1 March 1992) regulates the structure of government, the state's organisation and the rights of individuals. A printed version of the decree can be found in Saudi Arabia: The New Constitution: The Kingdom of Saudi Arabia, Vol. 8 No. 3 Arab Law Quarterly 258-270 (1993).
[172] According to A. M. AL-JARBOU, Judicial Independence: Case Study of Saudi Arabia, Vol. 19 No. 1 Arab Law Quarterly 5-54, at 14, footnote 31 (2004), state regulation is possible only (1) if the quran and the sunna remain silent on a matter, (2) if the rules of the Quran and the Sunna on a matter are of a very general nature, or (3) if there are different valid interpretations as to a certain provision of the quran and the sunna. Thus, in the context of Saudi Arabia, state legislation means supplemen-

especially true of family law, since its rules as elaborated by classical Islamic jurisprudence are deemed to be exhaustive.[173] This immobile state of affairs has completely paralysed family-law reform. It reflects the views of the conservative scholars, the *ulama*, who enjoy enormous political power[174], despite the clear power structure laid down in the Basic Law – which designates the King as the head of state who derives his authority directly from the holy sources of Islamic law and is thus not in fact subject to the control of any other state authority.[175]

Islamic law and jurisprudence in Saudi Arabia are dominated by the Hanbali school of thought, which is, in many respects, the strictest of the four Sunni schools,[176] and the official Saudi Arabian state doctrine is Wahhabism.[177] Wahhabites are an extremely conservative sect whose main points of view are largely modelled in accordance with Hanbali teaching.[178] Like the Hanbali school of thought, Wahhabism does not recognise non-textual sources of Islamic law, and personal reasoning or rationalist methods of interpretation of religious sources are therefore not permitted.[179] Wahhabites espouse a very traditional lifestyle, especially with regard to family law, and, at least to some extent, even adhere to puritanical pre-Islamic practices.[180] The resultant adverse consequences for women are justified by the different roles ascribed to the two sexes in Islam.[181]

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tary legislation and it is mainly to be found in sectors such as administrative, labour and commercial law since these are the areas of law where the sharia leaves more room for interpretation, cf. J. LEITES, Modernist Jurisprudence as a Vehicle for Gender Role Reform in the Islamic World, 22 Columbia Human Rights Law Review 251-330, at 283 (1990/1991); N. ABIAD, Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study, 144 et seq. (2008); cf. also J. SCHACHT, Islamic Law in Contemporary States, Vol. 8 No. 2 American Journal of Comparative Law 133-147, at 136 et seq. (1959). For more details see F. E. VOGEL, Saudi Arabia: Public, Civil and Individual Shari'a, in R. W. Hefner, Islamic Law and Society in the Modern World, 55-93, 55 et seq. (2011).

[173] See VOGEL, supra note 172 at 84; LEITES, supra note 172 at 284; G. N. SFEIR, The Saudi Approach to Law Reform, Vol. 36 No. 4 American Journal of Comparative Law 729-759, at 756 (1988).

[174] One famous example for such a conflict between the monarch and the ulama is the controversial ban on female drivers. It is well known that the king would be willing to allow women to drive but due to the ulama's resistance he refrained from lifting the prohibition, see VOGEL, supra note 172 at 59, 82 et seq. The ban is an ongoing issue in Saudi Arabia, cf. http://www.bbc.co.uk/news/world-middle-east-13809684 [16 Nomber 2012]; http://news.bbc.co.uk/2/hi/7000499.stm [16 November 2012].

[175] Arts. 7 and 70 of the Basic Law. See AL-JARBOU, supra note 172 at 19.

[176] See LEITES, supra note 172 at 282; Schacht, supra note 172 at 136; S. SHAMMA, Law and Lawyers in Saudi Arabia, Vol. 14 No. 3 International and Comparative Law Quarterly 1034-1039, 1034 (1965).

[177] The strong link between Wahhabism and the Saudi Arabian state is the result of a historic alliance of the current royal family, the house of Saud, and Muhammad ibn Abd al-Wahhab, the founder of the Wahhabi sect, back in the eighteenth century. At that time, King Ibn Saud was trying to ensure his supremacy over the Arabian Peninsula and invited al-Wahab to provide for a Wahhabist interpretation of the law in exchange for religious legitimisation of his claim to power. Cf. for example AL-JARBOU, supra note 172 at 19.

[178] See LEITES, supra note 172 at 282.

[179] See VOGEL, supra note 172 at 55 et seq.; H. CHAPIN METZ, Saudi Arabia: A Country Study, Federal Research Division, Library of Congress, 5th Edition 82 (1993); A. SAEED, Islamic Thought. An Introduction, 52 (2006).; H. ESMAEILI, On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System, Vol. 26 No. 1 Arizona Journal of International & Comparative Law 10-47, at 14 (2009).

[180] See LEITES, supra note 172 at 282. For more information on Wahhabism see W. OCHSENWALD, Saudi Arabia and the Islamic Revival, Vol. 13 No. 3 International Journal of Middle East Studies 271-286, at 283 (1981)

[181] See the Combined Initial and Second Periodic Report of Saudi Arabia under Article 18 of the CEDAW submitted on 29 March 2007, CEDAW/C/SAU/2, at 10 et seq.; E. A. DOUMATO, Saudi Arabia, Women's Rights in the Middle East and North Africa, Freedom House Special Report, 17, footnote 2, 34 (2009).

b) Minimum age for marriage

As outlined above, personal status and family law have not been codified in Saudi Arabia. The authoritative rules are the ones laid down in the Quran and the Sunna, as interpreted by the Hanbali school of law and Wahhabite ideology. Thus, minors lack the legal capacity to enter into marriage on their own. Physical evidence of the onset of puberty brings that incapacity to an end, provided that there are no mental deficiencies requiring further guardianship.[182] If the physical signs fail to appear, the Hanbali school assumes that puberty is attained by both sexes at the age of 15 years.[183] Furthermore, the consent to marriage by a woman who has attained legal capacity must be expressed by her guardian since she cannot conclude a marriage contract on her own,[184] although the consent of the woman is an indispensable prerequisite for the validity of the marriage.[185]

A minor can be married off by the guardian before reaching puberty, provided that consummation of the marriage is put off until puberty. The Hanbali school also recognises the right of a child spouse to terminate the marriage upon reaching puberty and before consummation. In practice, however, this right is hard to exercise, especially for girls since they usually cannot return to their parents' home after ending their betrothal. The formation of a marriage contract on behalf of a minor, even if it takes place shortly after birth, is not in and of itself regarded as immoral. Opinions appear to differ, however, as far as the appropriate time for the consummation of the marriage is concerned. Human rights groups as well as the state-run Human Rights Commission object that marriages are frequently consummated at too early an age. Medical practitioners oppose this practice by refusing to carry out the mandatory premarital tests if the future spouses are still very young.[186] Religious authorities, conversely, usually sanction the early consummation of marriage.[187]

To date, it can be said that the practice of marrying off children in order to clear debts or to ensure property rights is commonly accepted in Saudi Arabia, though it should be noted that reliable data on this are virtually non-existent. The most recent available statistics indicate that 3.9 percent of women aged 15 to 19 in 2007 were married.[188] The latest national demographic research, carried out in 2007, shows that 0.1 percent of these women were married at 15, 0.2 percent at 16, 0.2 percent at 17 and 0.2 percent at 18 years.[189] The number of women who were married at the age of 19 (3.2 percent) is significantly higher, at 3.2 percent. This indicates a

[182] Cf. ZAHRAA, supra note 25 at 251 et seq.

[183] Cf. BAKHTIAR, supra note 23 at 403; Zahraa, supra note 25 at 250, footnote 37.

[184] Cf. KHAN & KHAN, supra note 28 at 60.

[185] According to a circular issued by the Supreme Council of the Judiciary, courts and marriage registration officials need to secure the consent of the woman to the marriage (Decree No. 109 of 5 Jumada I 1391 AH). Mandatory registration of marriages is part of the state's authority to regulate administrative matters.

[186] See www.adnkronos.com/AKI/English/CultureAndMedia/?id=3.0.2865409658 [16 November 2012]. According to Royal Decree No. 5 of 18 March 2002 concerning the health regulations applicable to all Saudis wishing to marry, the future spouses have to undergo medical testing in order to obtain a marriage certificate. In 2008 the list of obligatory tests for several defined genetic or blood diseases was extended to tests for HIV/AIDS and certain forms of hepatitis.

[187] As mentioned above, the most significant argument put forward by the religious scholars is the marriage of Prophet Muhammad to the seven-year-old Aisha. Based on this tradition they deem girls much younger than fifteen years old mature enough for the consummation of marriage, cf. Y. ADMON, Rising Criticism of Child Bride Marriages in Saudi Arabia, The Middle East Media Research Institute, Inquiry & Analysis Series Report No. 502 of 8 March 2009 with references therein, available at http://www.memri.org/report/en/0/0/0/0/0/0/3216.htm [16 November 2012]. Nevertheless, the practice of marrying young girls to elderly men partly also encounters resistance from clerics, cf. http://english.alarabiya.net/articles/2012/11/08/248411.html [16 November 2012].

[188] See United Nations Department of Economic and Social Affairs, supra note 107.

[189] Cf. Demographic Research Bulletin 1428H (2007), Table 20-2, available at: http://www.cdsi.gov.sa/english/index.php?option=com_docman&task=cat_view&gid=77&Itemid=113 [16 November 2012]. These percentages were derived from the absolute figures contained in this table and rounded to one decimal place.

slight tendency towards a higher marriage age, albeit one which is not explained by the legal situation. The data for all women in 2007 who had ever been married show that around 8.3 percent had been married at the age of 15, 8.9 percent at the age of 16, 10.1 percent at the age of 17 and 9.2 percent at the age of 18.[190]

In recent years, child marriages, in particular constellations of very young girls wedded to elderly men, were often reported in the international and Saudi Arabian media.[191] Interestingly, there were several cases brought before Saudi Arabian sharia courts in which the state-run Human Rights Commission either actively tried to stop these marriages or to delay their consummation.[192] This commission is currently also carrying out research into the consequences of child marriages and plans, in conjunction with the Ministry of Justice, to prepare proposals for establishing a legal minimum age for marriage.[193] International pressure on the Saudi Arabian legislature was also exerted by the Committee on the Rights of the Child, which recommended setting the age of legal majority as well as the marriageable age at 18 years for both sexes.[194] In January 2011, the Saudi Arabian parliament passed a draft bill for a new child protection law. The aim of this draft legislation is to improve the protection afforded to children in a number of instances, including cases of negligence, trafficking and physical or mental abuse. In accordance with the Convention on the Rights of the Child, this new draft legislation also fixes the age of legal majority at 18 years for both sexes. However, in order to avoid a controversy with the *ulama*, the issue of a minimum age for marriage was carefully excluded from the debate.[195] In the light of the restraint exercised both by the King and by government officials with regard to family law, it appears highly unlikely that a minimum statutory age for marriage will be introduced in the near or indeed even the distant future.[196]

[190] Cf. Demographic Research Bulletin 1428H (2007), supra note 189 Table 21-2. These percentages were derived from the absolute figures contained in this table and rounded to one decimal place

[191] By way of example see the overview given by ADMON, supra note 187; http://www.globalpost.com/dispatch/saudi-arabia/090416/child-marriage-case-showcases-deep-splits-saudi-society [16 November 2012]; http://news.bbc.co.uk/2/hi/middle_east/7579616.stm [16 November 2012]; http://www.memri.org/report/en/0/0/0/0/0/0/3216.htm [16 November 2012].

[192] See for instance SAMBRIDGE A., Saudi 'Eyes Minimum Age for Marriage', ArabianBusiness.com, 20 January 2009, available at: http://www.arabianbusiness.com/saudi-eyes-minimum-age-for-marriage--81147.html [16 November 2012].

[193] Cf. BRINKLEY J., Child Marriage Still an Issue in Saudi Arabia, San Francisco Chronicle, 14 March 2012, available at: http://www.sfgate.com/opinion/brinkley/article/Child-marriage-still-an-issue-in-Saudi-Arabia-3270366.php [16 November 2012]; D. E. MILLER, Saudi Arabia Inches Closer to Ban on Child Marriages, The Jerusalem Post, 9 March 2011, available at: http://www.jpost.com/MiddleEast/Article.aspx?id=211404 [16 November 2012]; http://www.emirates247.com/news/region/saudi-approves-child-protection-law-2011-01-18-1.343828; H. TOMLINSON, 12-Year-Old Bride's Divorce Prompts Marriage Age Review in Saudi Arabia, The Sunday Times, 22 April 2010, available at: www.timesonline.co.uk/tol/news/world/middle_east/article7104248.ece [16 November 2012]; http://english.alarabiya.net/articles/2012/11/08/248411.html [16 November 2012]. However, the efforts of the Ministry of Social Affairs which had conducted earlier studies in this vein and submitted them to parliament in order to prepare for a statutory minimum age for marriage did not succeed.

[194] CRC/C/SAU/CO/2 of 17 March 2006, 6, No. 26.

[195] See MILLER, supra note 193. However, several members of parliament seem to argue in favour of minimum age legislation, cf. KAWACH N., Emirates 24/7, 2 June 2011, available at: http://www.emirates247.com/news/child-marriage-is-murder-of-innocence-2011-06-02-1.400336 [16 November 2012].

[196] In 2010 for example the Ministry of Interior introduced new standard marriage contracts which require marriage registration officials to record the age of the bride. The main idea behind this was to turn the officials' attention to the problem of child marriages and at least establish some kind of social, yet not legal control. Cf. also BRINKLEY, supra note 193, passim.

c) CEDAW

Saudi Arabia became a signatory to the CEDAW in 2000.[197] As was the case with other Muslim signatory states, ratification was subject to a very general reservation stating that, in cases of conflict between the convention and the sharia, Saudi Arabia would not be bound by the former.[198] Given that, as explained previously, classical Islamic law in Saudi Arabia still prevails in a very primordial, literal form, it is easily conceivable that the convention's progressive provisions will not fully come into effect. That indeed was also the conclusion reached by both the initial and second reports to the Committee on the Elimination of All Forms of Discrimination against Women[199].[200]

4. Iran

a) Marriageable age under the regime of the Shah

Following a coup d'état, Iran became a constitutional monarchy under the reign of Reza Shah Pahlavi in 1925. Dedicated to establishing a secular, central legal system, the Shah's receptiveness towards Western concepts was reflected in the legislation promulgated at that time, despite the fact that Iran, like Saudi Arabia, had never been subjected to colonial rule.[201] The Shah initiated a large-scale process of codification which also led to the promulgation of a law on marriage in 1931[202] and of the Iranian Civil Code in 1935.[203] The Civil Code was partly inspired by European models. However, in the field of personal status and family law, the reforms to previous Iranian law were kept within narrow bounds, and the rules codified in the Civil Code mainly corresponded to classical Islamic law as interpreted by the Shia doctrine.[204]

Notwithstanding the clear commitment to Shia Islam, a few provisions of the new legislation, including some related to marriageable age, deviated slightly from the traditional Jafari teachings.[205] Most notably, marriages of girls younger than 15 or boys younger than 18 years of age were forbidden as a matter of principle.[206] Power was bestowed on the courts to authorise marriages by spouses below these age limits with their guardians' approval and on condition that the marriage was justified by 'proper reasons', provided the female spouse was aged at least 13

[197] Royal Decree No. 25 of 28 August 2000.

[198] See L. A. KHAN, The Qur'an and the Constitution, 85 Tulane Law Review 161, at 187 (2010). In addition to the general reservation Saudi Arabia also made an explicit reservation to Art. 9 Para. 2 and Art. 29 Para. 1 of the convention.

[199] CEDAW/C/SAU/2 submitted on 29 March 2007. Cf. the obligation of the state parties under Art. 18 of the CEDAW.

[200] See for instance the critique expressed by KRIVENKO, supra note 29 at 168 et seq.; CEDAW/C/SAU/2, at 47 et seq. Altogether it becomes very clear that the protective effect of the CEDAW in Saudi Arabia is limited.

[201] Thus, the French Civil Code for example served as a model for several provisions, cf. Z. MIR-HOSSEINI, How the Door of Ijtihad Was Opened and Closed: A Comparative Analysis of Recent Family Law Reforms in Iran and Morocco, 64 Washington & Lee Law Review 1499, at 1502, footnote 9 with references (2007).

[202] Marriage Act of 1931, amended in 1937.

[203] See S. A. ARJOMAND, History, Structure, and Revolution in the Shi'ite Tradition in Contemporary Iran, Vol. 10 No. 2 International Political Science Review 111-119, at 115 et seq. (1989); H. SEDGHI, Women and Politics in Iran. Veiling, Unveiling and Reveiling, 65 (2007). These political reforms increasingly weakened the position of religious scholars and tribal authorities, cf. Y. ERTÜRK, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences of 27 January 2006, E/CN.4/2006/61/Add.3 at 5.

[204] See MIR-HOSSEINI, supra note 201, at 1503; MIR-HOSSEINI, supra note 16 at 33. Art. 12 of the Constitution of 1906 declared Twelver Shiism the official state doctrine of Iran, while some other schools of law enjoyed full recognition when it came to the performance of religious rituals. One of the typical Shia elements comprised in the code was the recognition of temporary marriage, see Art. 1075 of the Civil Code of 1935; MIR-HOSSEINI, supra note 16 at 24; A. E. GRAVES, Women in Iran: Obstacles to Human Rights and Possible Solutions, 5 American University Journal of Gender, Social Policy & the Law 57-92, at 63, footnote 29 (1996/1997).

[205] Cf. MIR-HOSSEINI, supra note 16 at 24.

[206] Art. 1041 of the Civil Code of 1935.

and the male spouse was at least 15 years old.[207] This meant that marrying off girls below 15 years of age without judicial permission was declared a punishable offence.[208] In order to establish state control over marriage and divorce, the registration of such events became mandatory.[209] Failure to register a marriage or notify a divorce made both the husband and the registry office official participating in the marriage proceedings liable to punishment.[210]
The age limitations set by the Civil Code and the Marriage Act were considerably higher than those advocated by the Jafari school, which defines marriageable age as nine for females and 15 for males.[211] The Shah's legislation in fact proved to be mainly beneficial to women of higher social class, since the age requirements set out by the new law were hardly observed in rural regions.[212] Furthermore, the courts, despite taking the new legislative provisions into account, did not in fact succeed in significantly reducing child marriages, because exceptions under article 1041 of the Civil Code were granted too permissively.[213]
In 1967, the primacy of classical Islamic law with regard to matters of personal status was substantially curtailed when a new Family Protection Law, subsequently revised in 1975, came into force. The new law was commonly seen as one of the most liberal family laws in the Middle East. While not directly challenging the intrinsically religious nature of the pre-existing law, the new law introduced a number of changes, most of which were purely formalistic in nature.[214] The practical effect of the registration requirement, for example, was reinforced by denying court access to claims related to unregistered marriages.[215] Moreover, although it refrained from explicitly negating the validity of temporary marriages, the new law did strictly prohibit such alliances from being registered.[216] Last but not least, the Family Protection Law also increased the marriageable age for females to 18 and for males to 20.[217] Girls could be given into marriage earlier, though not before the age of 15, provided that they had reached the requisite degree of physical development and the marriage was agreed upon by both the public prosecutor and the court.[218]

b) Islamic Revolution

In the Islamic Revolution of 1979, Ayatollah Ruholla Khomeini, a powerful cleric, succeeded in overturning the Iranian monarchy and proclaiming the Islamic Republic of Iran. The new constitution adopted in December of that year and still in force today marks the complete take-

[207] Art. 1041 of the Civil Code of 1935. Cf. D. A. MOMENI, The Difficulties of Changing the Age at Marriage in Iran, Vol. 34 No. 3 Journal of Marriage and Family 545-551, at 545 et seq. (1972).
[208] Art. 3 of the Marriage Act of 1931 as amended in 1937. If the girl had not even reached the age of 13 years or if she was physically harmed as a result of the marriage the punishment was more severe, cf. MOMENI, supra note 207 at 546.
[209] Art. 1 Para. 3 Marriage Act of 1931 as amended in 1937. Authors seem to differ as to whether unregistered marriages were denied legal validity or not, cf. MIR-HOSSEINI, supra note 16 at 166; Z. MIR-HOSSEINI, Women and Politics in Post-Khomeini Iran: Divorce, Veiling and Emerging Feminist Voices, in H. Afshar (Ed.), Women and Politics in the Third World 142-170, at 145 (1996); N. YASSARI, An Islamic Alternative: Temporary Marriage, in J. M. Scherpe & N. Yassari (Eds.), The Legal Status of Cohabitants 557-569, at 559, footnote 14 (2005) (affirmative); M. ENAYAT, Iran, in A. Bergmann & M. Ferid & D. Henrich (Eds.), Internationales Ehe- und Kindschaftsrecht mit Staatsangehörigkeitsrecht, at 38 (2002) (negative).
[210] Art. 1 Para. 2 of the Marriage Act of 1931 as amended in 1937.
[211] Cf. Part One, II; BAKHTIAR, supra note 23 at 403.
[212] Cf. ERTÜRK, supra note 203 at 5.
[213] For a detailed evaluation of the minimum age legislation of the 1930s cf. MOMENI, supra note 207 at 546 et seq.
[214] Cf. MIR-HOSSEINI, supra note 209 at 145; L. HALPER, Law and Iranian Women's Activism, in Z. R. Kassam (Ed.), Women and Islam 3-18, at 5 (2010).
[215] See MIR-HOSSEINI, supra note 16 at 166.
[216] See MIR-HOSSEINI, supra note 16 at 166.
[217] Art. 23 of the Family Protection Law as revised in 1975.
[218] Art. 23 of the Family Protection Law as revised in 1975.

over of the state by the Shiite clergy, fusing its democratic and theocratic elements.[219] It is deeply influenced by the authority structure prevalent in Shia Islam and confers great powers to the spiritual leader.[220] The constitution ordains that all forms of state legislation be compliant with the sharia, with the consequence that any laws which contradict the sharia are null and void.[221] In the aftermath of the revolution, the majority of the laws enacted under the Shah were not in fact repealed by the clergy, but were incorporated into the law of the republic instead.[222] Thus, the Family Protection Law was never formally suspended, but simply declared un-Islamic in a personal statement by Khomeini.[223] Indeed, some of its provisions did continue to be applied, though these related solely to matters of relative insignificance.[224]

During the period of re-Islamisation which followed the revolution, the question of marriageable age was re-visited as part of the 1983 revision of the Civil Code, and this revision also encompassed article 1041. The revised provision generally prohibits marriage before the age of majority,[225] which, in line with classical Shia doctrine, is defined as nine years for girls and 15 years for boys.[226] Marriage before puberty is permissible by way of exception, if the guardian approves of the marriage and the alliance serves the spouses' 'best interests'.[227] One provision which is at variance with classical Shia law is that a woman who has never been married before must obtain her guardian's consent for the conclusion of a marriage contract, even if she has already reached full legal majority.[228]

The 1983 amendments to the Civil Code – with the exception of the successive revisions to article 1041 set out below – are still in force today. The same applies to the Marriage Act of 1931 which, in common with the Family Protection Law, was not abrogated in the aftermath of the revolution. Today, the discrepancies between the wording of article 3 of the Marriage Act and the 1983 amendments to the Civil Code are largely ignored in practice on the basis that the alteration to the Civil Code also extends to the substance of the Marriage Act, so that the latter should be interpreted in the light of the revised Civil Code.[229]

[219] See ARJOMAND, supra note 203 at 116 et seq.

[220] Arts. 5 and 107 of the Constitution of 1979.

[221] Art. 4 of the Constitution of 1979. The power to review the conformity of state legislation with the rules of sharia is bestowed on the Guardian Council, a small board of Islamic scholars and jurists (Arts. 4, 72 and 91 of the Constitution of 1979). If a draft parliamentary bill is rejected by the Guardian Council, parliament can either go over the draft again or insist on it. If the Guardian Council is still unwilling to sanction the draft the matter will be referred to the Exigency Council, which will decide based on public welfare, not on conformity with the sharia (Art. 112 of the Constitution of 1979).

[222] See ARJOMAND, supra note 203 at 117. Thus, both the Civil Code of 1935 and the Marriage Act of 1931 as revised in 1937 remained in force, cf. YASSARI, supra note 209 at 559, footnote 14; MIR-HOSSEINI, supra note 201, at 1504 with references.

[223] See MIR-HOSSEINI, supra note 209 at 145.

[224] The secular courts instituted under the Family Protection Law for example continued to settle disputes until they were finally replaced by special civil courts in September 1979, see MIR-HOSSEINI, supra note 209 at 145. Similarly, the substantive restrictions imposed on polygamy by the Family Protection Law remained in force until 1984, cf. A. R. KOOHESTANI, Towards Substantive Equality in Iranian Constitutional Discourse, Vol. 7 No. 2 Muslim World Journal of Human Rights Article 2, 9 (2011); MIR-HOSSEINI, supra note 209 at 145.

[225] Art. 1041 of the Civil Code of 1935 as amended in 1983.

[226] Note 1 to Art. 1210 of the Civil Code of 1935 as amended in 1983.

[227] Note 1 to Art. 1041 of the Civil Code of 1935 as amended in 1983.

[228] Art. 1043 of the Civil Code of 1935 as amended in 1983. Cf. also N. SHID, Selected Aspects of Iranian Family Law, in N. Yassari (Ed.), The Shari'a in the Constitutions of Afghanistan, Iran and Egypt – Implications for Private Law 141-152, at 142 (2005). Therefore, for girls who had not been married before the option of puberty did not, de facto, offer any way out of an unwanted marriage. Yet, conversely, if a girl intended to marry and her guardian refused his consent the girl under Art. 1043 of the Civil Code had the right to apply to the court in order to conclude her marriage.

[229] See ENAYAT, supra note 209 at 36; V. M. MOGHADAM, Women in the Islamic Republic of Iran: Legal Status, Social Positions, and Collective Action, Presenter's Article for the Conference "Iran After 25 Years of Revolution: A Retrospective and a Look Ahead" at the Woodrow Wilson International Center for Scholars, 16 November 2004, available at: www.wilsoncenter.org/events/docs/ValentineMoghadamFinal.pdf [16 November 2012].

Around the year 2000, the Iranian parliament again addressed the minimum age for marriage by referring a redraft of article 1041 of the Civil Code to the Guardian Council. This redrafted version proposed raising the marriageable age for girls from nine to 13 years, while maintaining the age limit of 15 years for boys.[230] The Guardian Council rejected the bill, which the parliament then referred to the Council of Exigency for a final decision. That body approved the redraft, though it also insisted on an additional clause which permitted the marriage of girls younger than 13 years based on the guardian's consent and the girls' physical maturity, thus rendering the proposed age limitations non-compulsory.[231] This version of article 1041 was finally adopted and is still in force to this day. It should however be noted that the chairman of the Iranian parliament's legal affairs committee recently announced that the committee is again envisaging lowering the marriageable age for girls under article 1041 of the Civil Code back down to nine years.[232]

In July 2007, a new draft bill for the protection of the family was submitted to the Iranian parliament for discussion. Amongst other things, the draft addresses the problem of non-registration of marriage and provides for compulsory registration of all changes in marital status. Most notably, in its original form, the draft also imposed an obligation to register temporary marriages in order to safeguard the interests not only of the woman, but also of any children, who, if born out of a non-registered marriage, typically lack sufficient legal protection with regard to healthcare and education.[233] In March 2012, however, the Iranian parliament passed a new version of the provision which renders registration of temporary marriages optional, except in cases where the woman is pregnant.[234] Because it also contains some highly controversial provisions relating to polygamy and the taxation of dowers, the rest of the draft is currently still awaiting parliamentary ratification.[235]

The fact that registration of temporary marriages is not compulsory notably compromises the accuracy of the data collected in the latest available demographic surveys on marriage and the family.[236] The official statistics indicate that in 2006 16.6 percent of women aged 15 to 19 were

[230] Previously, parliament had formulated two other drafts in the same matter but the Guardian Council had rejected both bills on the grounds that they violated the sharia. The first redraft wanted to reintroduce the age limitations that had been implemented by the first version of the Family Protection Law of 1967, i.e. 15 years for girls and 18 years for boys. The second redraft suggested raising the minimum age for girls to 14 and for boys to 17 years. Cf. also P. NORTHON, How Many Bicameral Legislatures Are There?, Vol. 10 No. 4 Journal of Legislative Studies 1-9, at 5 (2007); N. YASSARI, Das iranische Familienrecht und seine Anwendung im Teheraner Familiengericht, in S. Tellenbach & T. Hanstein, Beiträge zum Islamischen Recht IV, 59-76, at 70 (2004).

[231] See R. BARLOW & S. AKBARZADEH, Prospects for Feminism in the Islamic Republic of Iran, Vol. 30 No. 1 Human Rights Quarterly 21-40, at 28 (2008); S. TREMAYNE, Modernity and Early Marriage in Iran: A View from Within, Vol. 2 No. 1 Journal of Middle East Women's Studies 65-94, at 71 (2006); ERTÜRK, supra note 203 at 9.

[232] Cf. TSAI V., Child Bride Practice Rising in Iran, Parliament Seeks to Lower Girl's Legal Marriage Age to 9, International Business Times, 30 August 2012, available at: http://www.ibtimes.com/child-bride-practice-rising-iran-parliament-seeks-lower-girls-legal-marriage-age-9-760263 [16 November 2012].

[233] Cf. A. OSANLOO, What a Focus on 'Family' Means in the Islamic Republic of Iran, in M. Voorhoeve (Ed.), Family Law in Islam. Divorce, Marriage and Women in the Muslim World 51 et seq., at 52 (2012).

[234] Art. 22 of the Draft Bill. Cf. http://www.payvand.com/news/12/mar/1064.html [16 November 2012]; http://theiranproject.com/blog/2012/03/08/iran-mps-temporary-marriage-registration-not-mandatory-2/ [16 November 2012]; TAHMASEBI S., The Family Protection Bill Hurts not only Women but Men and Children too, Interview with Farideh Gheyrat on the Family Support Bill, 13 November 2010, available at: http://we-change.org/english/spip.php?article792 [16 November 2012].

[235] Cf. http://www.payvand.com/news/10/aug/1318.html [16 November 2012]. For more information on the draft cf. I. SCHNEIDER, Civil Society and Legislation: Developments of the Human Rights Situation in Iran in 2008, in H. Elliesie (Ed.), Beiträge zum Islamischen Recht VII, Islam and Human Rights, 387-414, passim (2010).

[236] See TREMAYNE, supra note 231 at 71.

married.[237] A study conducted in 2004/2005 revealed that 16 percent of married women aged 15 or older had been married before the age of 15 and that 53 percent of women aged 15 to 19 married of their own free will.[238] Furthermore, more recent data compilations also reveal a dramatic, 30-percent increase in the number of under-age marriages between 2006 and 2009.[239] Overall, despite the theocratic nature of the Iranian state, there are reform-oriented movements in the country which both oppose misinterpretations of the holy sources by clerical leaders and call for modernist re-readings of Islamic teaching.[240] Strict clerical interpretations do however enjoy considerable support in the conservative-dominated Guardian Council, which has proven to be a major obstacle to reform on several occasions.[241]

c) CEDAW

In 2003, the Iranian parliament passed a resolution for Iran to join the CEDAW. The bill was later rejected by the Guardian Council on the grounds that the provisions of the CEDAW violate both the Iranian constitution and the sharia.[242] The Council's reasoning was based on the principles of gender equality in Islam teaching. According to the Islamic notion of equality, men and women do not enjoy equal rights, because they are different in nature and therefore require different kinds of protection.[243] Interestingly, as indicated above, ratification of the CEDAW was discussed by both proponents and opponents in an entirely Islamic framework which was not in any way influenced by international perceptions of human rights. While supporters of the convention argued that the provisions of the CEDAW were compatible with Islam, the opponents of the convention put forward arguments demonstrating their inconsistency with Islamic teaching.[244] Since the proposed adoption of the CEDAW was dismissed by the Guardian Council, the matter has now been placed before the Council of Exigency for a final decision.[245]

5. Afghanistan

a) Legal pluralism

When Afghanistan gained independence from British colonial rule in 1919, its legal system exhibited a complex, triple-layered structure comprising elements of Islamic, customary and statutory law. In everyday life, Islamic and customary law played a much more important role than statutory law, since they had already held sway in Afghanistan for centuries, whereas state regulation had only been introduced by the Afghan rulers in the late nineteenth and early twentieth century. The Afghan population was a heterogeneous composition of various different tribes, ethnicities and religious communities. For them, Islamic law provided a common

[237] See United Nations Department of Economic and Social Affairs, supra note 107.
[238] Cf. A. KIAN-THIÉBAUT, From Motherhood to Equal Rights Advocates: The Weakening of Patriarchal Order, Vol. 38 No. 1 Iranian Studies 45-66, at 51 et seq. (2005).
[239] Cf. TSAI, supra note 232; Report of the Special Rapporteur on the Situation of Human rights in the Islamic Republic of Iran of 13 September 2012, A/67/369 at 21 et seq., available at: http://www.iranhrdc.org/english/human-rights-documents/united-nations-reports/un-reports/1000000196-report-of-the-special-rapporteur-on-the-situation-of-human-rights-in-the-islamic-republic-of-iran-13-september-2012.html#.UJ0QtlElrTp [16 November 2012].
[240] See BARLOW & AKBARZADEH, supra note 231 at 25 et seq.
[241] See ERTÜRK, supra note 203 at 9.
[242] See KOOHESTANI, supra note 224 at 2; MIR-HOSSEINI, supra note 201, at 1505; OSANLOO, supra note 233, at 62.
[243] Cf. BARLOW & AKBARZADEH, supra note 231 at 29. The principle is enshrined in Arts. 20 and 21 of the Constitution of 1979.
[244] One argument against the ratification was that the convention's notion of equality would deprive women of rights which they enjoyed under Islamic law such as not being obliged to maintain the family, cf. ERTÜRK, supra note 203 at 8.
[245] See also SCHNEIDER, supra note 235 at 391, 405.

ground and identity. It proved to be a consistent, stable body of rules even in times of political turbulence and uncertainty. Islamic law was interpreted and applied according to the Hanafi school of thought, which was followed by the majority of Afghans.[246] Tribal customs, on the other hand, often either adapted these religious rules to local needs or, in some instances, entirely overlooked them.[247] Customary usages were elaborated through oral traditions, which essentially outlined codes of conduct or honour applicable to the members of a specific group or clan.[248] These codes varied significantly from tribe to tribe and were subject to continual change.[249] The scope for the application of these codes partly overlapped with sharia law, because they also addressed matters relating to criminal, property and marriage law.[250] Today, customary law is still of vital importance among the Afghan tribal structures. Most notably, traditional habits such as dispute settlement through so-called *jirgas* or *shuras* often serves as a basis for the legitimacy of political actions as well as providing a judicial framework for civil and criminal law cases.[251]

In contrast to Islamic and customary law, statutory legislation, as indicated above, is a much more recent phenomenon in Afghanistan. Initially, the Afghan rulers aimed at consolidating their leadership through purely administrative measures and left matters of personal status and family law fully at the discretion of the sharia and customary law.[252] It was not until the formation of a modern nation state in Afghanistan in the 1910s that the legal reforms pursued by the rulers also extended to personal status law as a means of prohibiting customary practices that had repeatedly caused tribal controversies in the past.[253]

One such problem that had attracted the King's attention was the issue of child marriages. In those days, marriages of minors were often arranged by parents in order to return a favour, ensure inheritance rights or stabilise bonds between families.[254] A law passed by the King in

[246] Cf. T. BARFIELD, Culture and Custom in Nation-Building: Law in Afghanistan, Vol. 60 No. 2 Maine Law Review 347-373, 352 (2008). A considerable minority of Afghans adhered to the Jafari school of law. However, as outlined below, Shia doctrine was not officially recognised as a source of law until 2004.

[247] See C. T. RIPHENBURG, Post-Taliban Afghanistan: Changed Outlook for Women?, Vol. 44 No. 3 Asian Survey 401-421, 410 (2004). Cf. also M. H. SABOORY, The Progress of Constitutionalism in Afghanistan, in N. Yassari (Ed.), The Shari'a in the Constitutions of Afghanistan, Iran and Egypt – Implications for Private Law 5-22, 6 (2005). Remarkably, most of Afghan citizens do not have profound knowledge of Islamic law itself and often believe that customary traditions are compatible with the sharia, cf. Max Planck Institute for Foreign Private Law and Private International Law, Family Structures and Family Law in Afghanistan. A Report of the Fact-Finding Mission to Afghanistan January – March 2005, 10 (2005), available at: http://www.mpipriv.de/shared/data/pdf/mpi-report_on_family_structures_and_family_law_in_afghanistan.pdf [16 November 2012].

[248] Cf. BARFIELD, supra note 246 at 351 et seq.; N. YASSARI, Legal Pluralism and Family Law: An Assessment of the Current Situation in Afghanistan, in N. Yassari (Ed.), The Shari'a in the Constitutions of Afghanistan, Iran and Egypt – Implications for Private Law 45-60, 49 (2005). The most important and well-known customary codex is the Pashtunwali, created by the ethnicity of Pashtuns. For more information in this regard see W. STEUL, Paschtunwali: Ein Ehrenkodex und seine rechtliche Relevanz, passim (1981); SCHNEIDER, supra note 35 at 212 et seq.

[249] Cf. BARFIELD, supra note 246 at 351 et seq. There, BARFIELD also points out the influential power of the religious scholars who at times even stepped in and enforced the correction of customary law which they saw as diverging too far from the classical sharia.

[250] Cf. KAMALI, supra note 35 at 46; YASSARI, supra note 248 at 49.

[251] Cf. C. JONES-PAULY & N. NOJUMI, Balancing Relations Between Society and State: Legal Steps Toward Reconciliation and Reconstruction of Afghanistan, Vol. 52 No. 4 American Journal of Comparative Law 825-857, 829 (2004); SCHNEIDER, supra note 35 at 216. The term jirga refers to a gathering of representatives of a tribe or community in order to discuss and decide on a specific problem. For more details see YASSARI, supra note 248 at 53.

[252] Cf. also YASSARI, supra note 248 at 47 et seq., 54; BARFIELD, supra note 246 at 353.

[253] Cf. SCHNEIDER, supra note 35 at 222 et seq.; H. TRAVIS, Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq, 3 Northwestern University Journal of Human Rights 1-52, 3 et seq. (2005).

[254] Cf. KAMALI, supra note 35 at 108 et seq. It was also very common for families to exchange their daughters in marriage in order to avoid pre-marital expenses or to give a girl into marriage as compensation for a previously committed crime, cf. United Nations Assistance Mission in Afghanistan & United Nations High Commissioner for Human Rights, Report, Harm-

1921 prohibited marriage before majority.[255] It also abolished the guardian's power to conclude a marriage contract on behalf of his ward in cases where the ward was below 13 years of age.[256] Disputes arising from marriages concluded on behalf of a ward younger than 13 years were denied judicial hearing.[257]

The Law on Marriage of 1921, as well as other secularising reforms initiated by the King, encountered harsh opposition both from clerical circles struggling to maintain their influential position and clans fearing for their local authority.[258] In 1924, the reforms were discussed in a *loya jirga*, a gathering of the country's most prominent tribal and clerical leaders. As a result, both the Constitution of 1923 and the Law on Marriage of 1921 were amended. In response to clerical demands, the revised constitution explicitly named the Hanafi school of law as the official Afghan state doctrine.[259] Marriage before the age of 13 was tolerated, judicial access was granted to claims arising out of such alliances, and the revised law merely emphasised the social dangers related to early marriage.[260] The option of puberty was explicitly enshrined in the law for both boys and girls, but it was limited to marriages contracted by any person other than the spouses' father or grandfather.[261]

In 1960, another law was promulgated which sought to reduce the incidence of child marriages by unequivocally stating that a marriage before the age of 15 was not a marriage of majority.[262] As interpreted by Kamali, this provision was, at most, tantamount to a recommendation of adult marriage and fell well short of directly banning child marriages.[263] However, the guardian's compulsory power was curtailed to the extent that he was no longer allowed to conclude a marriage contract on behalf of a ward younger than 15 years old if he either had a reputation for moral corruption or if the marriage did not safeguard the ward's best interests.[264] Non-compliance with these requirements rendered the marriage contract invalid and claims related to a marriage not evidenced by a valid marriage contract were denied judicial hearing.[265]

The objective of the 1960 law was to establish clarity through a clear age requirement. In practice, however, since Afghanistan lacked a comprehensive birth registration system, the age of the spouses could often not be ascertained beyond doubt, thus leaving the final decision to the courts' discretion and significantly curtailing the protection afforded to minors by the law.[266] As a result of the difficulties associated with ascertaining the ages of young spouses, the explic-

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ful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan, 15 et seq. (2010), available at: http://unama.unmissions.org/Portals/UNAMA/Publication/HTP%20REPORT_ENG.pdf [16 November 2012].

[255] Art. 5 of the Nizamnama (Law) of Marriage of 1921.

[256] Art. 6 of the Nizamnama (Law) of Marriage of 1921. See KAMALI, supra note 35 at 110.

[257] Art. 8 of the Nizamnama (Law) of Marriage of 1921.

[258] Cf. YASSARI, supra note 248 at 54 et seq.; BARFIELD, supra note 246 at 348 et seq.; SABOORY, supra note 247 at 6; MOGHADAM V., Modernizing Women. Gender and Social Change in the Middle East, 2nd Edition, 238 et seq. (2003).

[259] Art. 2 of the Constitution of 1923 as amended in 1924. See SABOORY, supra note 247 at 6.

[260] Arts. 3 and 5 of the Nizamnama (Law) of Marriage of 1921 as amended in 1924. See KAMALI, supra note 35 at 116, footnotes 16 and 17. According to article 5, all disputes in this regard had to be brought before the court until the year 1305 A.H. Claims brought later and not evidenced by a document or decisive proof could not be heard by the courts unless the monarch himself authorises the court to entertain them.

[261] Art. 9 of the Nizamnama (Law) of Marriage of 1921 as amended in 1924. See KAMALI, supra note 35 at 116, footnote 18.

[262] Art. 2 of the Law on Marriage of 1960.

[263] See KAMALI, supra note 35 at 112.

[264] Art. 19 of the Law on Marriage of 1960. See KAMALI, supra note 35 at 113.

[265] Arts. 5 and 18 of the Law on Marriage of 1960. Yet, an exception was to be made if there was a child born from such a marriage or if neither of the spouses contested the marriage, see KAMALI, supra note 35 at 113, footnote 20; H. MALIKYAR, Development of Family Law in Afghanistan: The Roles of the Hanafi Madhab, Customary Practices and Power Politics, Vol. 16 No. 3 Central Asian Survey 389-399, at 394 (1997).

[266] Cf. KAMALI, supra note 35 at 117.

it statutory marriage age was eventually abandoned when this law was revised in 1971 and substituted by a relatively vague clause stating that the marriage of a bride and groom below the age of majority was not a marriage of majority.[267] Apart from this purely formal modification, the remaining measures set out by the 1960 law to prevent the guardian from abusing his powers were maintained.[268] Access to court was broadened, as courts were now also allowed to hear marriage-related claims in cases where the marriage was established by reliable witness statements that a marriage had been concluded or that the couple were cohabiting as man and wife.[269]

b) The Civil Code of 1977

In 1973, Afghanistan became a republic and subsequently adopted a new constitution. With the enactment of the new Civil Code in 1977, personal status and family law was comprehensively codified for the first time.[270] The code was mainly based on the Hanafi school of thought, though it also incorporated a number of elements taken from the Maliki school of law and the French Civil Code.[271] The code emphasised the precedence of statutory law over Islamic law.[272] Article 70 of the Civil Code defined the minimum marriageable age as 16 for girls and 18 for boys. Girls below this age could only be given in marriage by their guardian if judicial permission was sought and obtained and if they were at least 15 years old.[273] A woman with full legal majority was granted the right to conclude a marriage on her own.[274] This autonomy in contracting a marriage was congruent with both the classical Hanafi position and with article 517 of the Penal Code adopted in 1976, which also classified certain forms of forced marriage as criminal offences.[275] Moreover, the Civil Code eventually also introduced the mandatory registration of marriages as well as other changes in marital status law.[276]

In theory, the Civil Code of 1977 was intended to replace the application of uncodified sharia and customary law norms, particularly with regard to harmful traditional practices such as child marriage and the sale of children, mostly girls, in return for goods or favours.[277] In fact, however, the practical implementation of statutory measures preventing these practices was

[267] Art. 3 of the Law on Marriage of 1971. An electronic version of the document is available at: http://www.asianlii.org/af/legis/laws/lom1971ogn190p1971080813500517a383/ [16 November 2012]; cf. also KAMALI, supra note 35 at 122 et seq., who also indicates that in the preceding parliamentary debate different proposals for the formulation of this article had been made, such as retaining the age limit of 15 years or setting it at an even higher level.

[268] Art. 20 of the Law on marriage of 1971, according to which the guardian was not permitted to conclude a marriage contract on behalf of his ward if he had a bad moral reputation or the marriage was of no benefit to the minor.

[269] Art. 37 of the Law on Marriage of 1971 and Supreme Court Circular No. 1991/21:IX.1350/1971. For more details see KAMALI, supra note 35 at 125 et seq.

[270] Cf. YASSARI, supra note 248 at 56. An electronic version of the document is available at: http://www.asianlii.org/af/legis/laws/clotroacogn353p1977010513551015a650/ [16 November 2012].

[271] Cf. YASSARI, supra note 248 at 56; Schneider, supra note 35 at 212.

[272] Art. 1 Para. 2 of the Civil Code of 1977 permitted the application of Islamic law only where no statutory provision exists. This article was in conformity with Art. 99 of the new constitution which had been enacted in 1977 and allowed courts to apply sharia law based on the Hanafi opinion only in the absence of statutory law.

[273] Art. 71 of the Civil Code of 1977.

[274] Art. 80 of the Civil Code of 1977, see MALIKYAR, supra note 265 at 394.

[275] Under Art. 517 Para. 1 of the Penal Code of 1976 any person giving in marriage a widow or a woman of 18 years or older contrary to her will was liable to imprisonment. Para. 2 of the same article aggravated the punishment in cases where the marriage was concluded as compensation for a previously committed crime. An electronic version of the document is available at: http://www.cicr.org/ihl-nat.nsf/6fa4d35e5e3025394125673e00508143/845809a497304d8fc12571140033ac69/$FILE/Penal%20Code%20-%20Afghanistan%20-%20EN.pdf [16 November 2012].

[276] Arts. 48 and 61 of the Civil Code of 1977.

[277] According to Art. 1 of the Civil Code of 1977 the application of religious law is not permitted unless the code contains no provision on a particular matter, see YASSARI, supra note 248 at 56.

far from systematic and they continued to occur, particularly in rural areas where centralised state control held little sway.[278] Generally speaking, statutory interventions were not as readily accepted by the Afghan population as sharia and customary law norms, a circumstance which was at least partly attributable to the instability of the political situation and the corresponding decline of confidence in state institutions.[279]

Shortly after the enactment of the Civil Code in 1977, the political climate underwent a further major change when power was seized by a communist regime driven by the ambition to turn Afghanistan into a modern socialist state. In addition to radical land reforms and the enactment of a provisional constitution, reforms in the field of personal status law were also part of the communist agenda.[280] A decree issued by the communist Revolutionary Council in 1978 aimed at abolishing discriminatory marital customs directly challenged the Islamic notion of gender equality.[281] It declared engagements and marriages involving girls below 16 and boys below 18 years of age to be punishable offences, thus making the rules set forth in the Civil Code more stringent.[282] Faced with massive protests by both tribes and clerics alike, the government later suspended the decree on gender equality along with its legislation on land reforms.[283]

Political instability continued when the communist regime was overthrown by a coalition of Islamist warlords, the so-called *mujaheddin*, and did not come to an end until internal power struggles among the warlords gave way to the rise of the Taliban, an extremely conservative Islamist sect, in 1996.

c) Taliban rule

The Taliban movement's ideology was in some respects similar to that of the Wahhabist doctrine. The Taliban strove to establish a theocratic state under the strict rule of sharia in its primordial form.[284] All laws enacted under the communist regime were revoked and those which had been in force prior to the communist takeover were re-enacted.[285] Courts were instructed to follow a strict interpretation of the sharia with due regard to the Hanafi school of thought.[286] Priority was also given to the eradication of customary practices which the Taliban deemed contradictory to Islamic law. Paradoxically, the Taliban themselves generally lacked any profound knowledge of either the theological foundations of Islamic jurisprudence or its classical methods.[287]

[278] See YASSARI, supra note 248 at 47, 56; KAMALI, supra note 35 at 126 et seq.

[279] Cf. also BARFIELD, supra note 246 at 348; V. M. MOGHADAM, Revolution, the State, Islam, and Women: Gender Politics in Iran and Afghanistan, 22 Social Text 40-61, 44 (1989).

[280] See H. AHMED-GOSH, A History of Women in Afghanistan: Lessons Learnt for the Future Or Yesterdays and Tomorrow: Women in Afghanistan, Vol. 4 No. 3 Journal of International Women's Studies 1-14, 6 (2003); SABOORY, supra note 247 at 13. One of the most contested issues was the education of girls, cf. MOGHADAM, supra note 279 at 56.

[281] Decree No. 7 of 1978 of the Revolutionary Council. Arts. 1 and 2 for instance outlawed the practice of giving a woman in marriage in return for money or other favours cf. MOGHADAM, supra note 279 at 47. The impetus of the communist legislation did not take into account customary or religious peculiarities but was driven by a purely autonomous notion of equality, cf. SCHNEIDER, supra note 35 at 223.

[282] Arts. 5 and 6 of the Decree No. 7 of 1978 of the Revolutionary Council.

[283] Cf. KAMALI, supra note 35 at 128; AHMED-GOSH, supra note 280 at 6; W. M. RAHIMI, Status of Women: Afghanistan, 31 Social and Human Sciences in Asia and the Pacific: Afghanistan 1, at 29 (1991).

[284] Cf. TRAVIS, supra note 253 at 12 et seq.; N. NOJUMI, The Rise and Fall of the Taliban, in R. D. Crews & A. Tarzi (Eds.), The Taliban and the Crisis of Afghanistan 90, at 91 (2008).

[285] – albeit with the exception of all provisions related to the monarchy, see SABOORY, supra note 247 at 17.

[286] See SABOORY, supra note 247 at 18.

[287] See TRAVIS, supra note 253 at 13; SABOORY, supra note 247 at 18.

d) Process of reconstruction

After the collapse of the Taliban regime in 2001, the political reconstruction of Afghanistan was initiated by an agreement signed in Bonn, Germany.[288] This document reinstated the Constitution of 1964 as well as most of the laws and regulations in force prior to the communist era.[289] Accordingly, the Civil Code of 1977 re-entered the statute books in 2001.[290] A new constitution was adopted in January 2004 which declares Islam to be both the state religion and the benchmark for statutory legislation.[291]

Today, the statutory approach to child marriage sets out clear limitations. As outlined above, the reinstated Civil Code defines the marriageable age as 16 years for girls and 18 years for boys and prohibits the conclusion of a marriage contract by a guardian on behalf of girls younger than 15 years.[292] A new standard marriage contract introduced by the Supreme Court of Afghanistan in 2007 in accordance with the Civil Code stipulates that the girl should be at least 16 years old at the time of marriage.[293] Moreover, in 2009, a new Law on Elimination of Violence against Women was enacted. Its primary goal is to eliminate harmful customary practices which have no basis in Islamic law.[294] The law qualifies specific practices as acts of violence against women, including the selling or buying of women in the context of marriage, forced marriage and marriage before the minimum legal age.[295] This law also urges the government to take both protective and informative measures to eliminate these practices.[296]

A further notable development was the Shia Personal Status Law, which came into force in 2009 and was designed to address the special needs of Afghanistan's large Shiite minority.[297]

[288] Agreement on Provisional Arrangements of 5 Decemver 2001. An electronic version of the document is available at: http://www.un.org/News/dh/latest/afghan/afghan-agree.htm [16 November 2012].

[289] Art. II, Para. 1 of the Agreement on Provisional Arrangements of 5 December 2001. The agreement also established an interim authority which was empowered to repeal or modify these laws. Cf. also A. WARDAK, Building a Post-War System in Afghanistan, 41 Crime, Law and Social Change 319-341, 328 (2004).

[290] Cf. M. H. KAMALI, Islam and its Shari'a in the Afghan Constitution 2004 with Special Reference to Personal Law, in N. Yassari (Ed.), The Shari'a in the Constitutions of Afghanistan, Iran and Egypt – Implications for Private Law 23-44, 39 (2005); I. SCHNEIDER, Recent Developments in Afghan Family Law: Research Aspects, 104 ASIEN 106-118, at 109 (2007).

[291] Under Art. 2 of the Constitution of 2004, Islamic law can only be applied in the absence of a statutory provision. Art. 3 of the Constitution ordains that no law or international convention be in contradiction with Islam. The power to review the constitutionality of national laws and treaties is vested in the Supreme Court (Art. 121 of the Constitution of 2004). See D. KANDIYOTI, Between the Hammer and the Anvil: Post-Conflict Reconstruction, Islam and Women's Rights, Vol. 28 No. 3 Third World Quarterly 503-517, 506 et seq. (2007). Under art. 54 of the Constitution, the state shall adopt any necessary measures to attain the physical and spiritual health of the family, including the elimination of related traditions contrary to the principles of Islam. An electronic version of the document is available at: http://www.afghanembassy.com.pl/cms/uploads/images/Constitution/The%20Constitution.pdf [16 November 2012].

[292] Arts. 70 and 71 of the Civil Code of 1977.

[293] See http://www.irinnews.org/report.aspx?reportid=70684 [16 November 2012].

[294] Art. 2 of the Law on Elimination of Violence against Women of 2009. For more information cf. A. GILBERT, Reforming and Drafting Laws in the Post-Taliban Era: The Role of Coalitions, in International Centre for Human Rights and Democratic Development, A Woman's Place. Perspectives on Afghanistan's Evolving Legal Framework 15-26, 18 et seq. (2010), available at: http://appro.org.af/downloads/A_Womans_Place.pdf [16 November 2012].

[295] Art. 5 of the Law on Elimination of Violence against Women of 2009. See also United Nations Assistance Mission in Afghanistan & United Nations High Commissioner for Human Rights, supra note 254 at 3.

[296] For more information on the law in general as well as on its weak points see United Nations Assistance Mission in Afghanistan & United Nations High Commissioner for Human Rights, supra note 254 at 3 et seq.

[297] Art. 1 of the Shiite Personal Status Law of 2009 referred to Art. 131 of the Constitution of 2004 which, as explained above, permits the application of Shia jurisprudence in special circumstances. An electronic version of the document is available at: http://www.unhcr.org/refworld/docid/4a24ed5b2.html [16 November 2012]. The law caused vigorous protests both in the international media and among the Afghan civil society. While human rights activists criticise the law on the basis that it contrads international human rights obligations and the Afghan constitution, Afghan citizens have revolted against the clear signs of Iranian influence and its restrictive interpretation of Islamic law, cf. http://www.hrw.org/news/2009/08/13/afghanistan-law-curbing-women-s-rights-takes-effect [16 November 2012]; C. FARHOUMAND-SIMS, Family Law in Afghanistan: Reflecting on the Past to Understand the Present and Prepare for the Future, in

This law contains distinct provisions with regard to marriageable age and the marriage of minors. It differentiates between marriages of minors and marriages of adults and makes the former conditional on either the guardian's approval or judicial permission.[298] Male puberty is defined as occurring at the age of 15 years or at the time of first ejaculation, while female puberty is marked by the onset of menstruation. Both these definitions are compatible with the classical Shia interpretation.[299] Furthermore, the validity of a virgin girl's marriage contract is contingent upon her own consent and the permission of her guardian or, failing that, the permission of a court.[300] A husband consummating a marriage before his wife reaches puberty is liable to punishment.[301] Last but not least, the law also enshrines the option of puberty for both sexes, though only in cases where a marriage concluded by a guardian does not safeguard the ward's best interests.[302]

Despite these substantial efforts to reduce the incidence of child marriages, it should be remembered that, for as long as it has existed, statutory legislation in Afghanistan has never really succeeded in taking the place of either religious law or traditional practices. The poverty, illiteracy and the lack of economic development which long periods of war have brought in their wake have all served to obstruct the practical implementation of statutory legislation, as indeed has the somewhat hostile approach taken to such norms by the tribal authorities and, perhaps most importantly of all, widespread unawareness of their existence among the general population. There are thus numerous reasons why, even today, Afghanistan's official legal framework has relatively little bearing on the legal realities of everyday life. A good example of this can be seen in the fact that only about five percent of marriages are estimated to be registered at all, even though such registration is mandated by article 61 of the Civil Code.[303] Similarly, the clear tenets set out in the statutory legislation with regard to child marriage have clearly yet to become fully effective, since, according to the Ministry of Women's Affairs and a number of NGOs, up to 57 percent of girls are in fact married before the age of 16.[304] This problem is aggravated by the absence of a nationwide birth registration system and the fact that, as a result, marriages are ordinarily concluded based upon simple estimates of the spouses' ages.[305] Moreover, studies carried out by the Afghanistan Independent Human Rights Commis-

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International Centre for Human Rights and Democratic Development, A Woman's Place. Perspectives on Afghanistan's Evolving Legal Framework 5-13, 13 (2010), available at: http://appro.org.af/downloads/A_Womans_Place.pdf [16 November 2012].

[298] Art. 99 Para. 1 of the Shiite Personal Status Law of 2009.

[299] Art. 27 of the Shiite Personal Status Law of 2009.

[300] Art. 102 of the Shiite Personal Status Law of 2009.

[301] Art. 100 of the Shiite Personal Status Law of 2009.

[302] Art. 99 Para. 2 of the Shiite Personal Status Law of 2009.

[303] See ERTÜRK, supra note 203 at 8. Cf. also SCHNEIDER, supra note 290 at 112, 115; Max Planck Institute for Foreign Private Law and Private International Law, supra note 247 at 10; S. BAGHAM & W. MUKHATARI, Study on Child Marriage in Afghanistan, Medica Mondiale, 5 (2004), available at: http://www.medicamondiale.org/fileadmin/content/07_Infothek/Afghanistan/Afghanistan_Child_marriage_medica_mondiale_study_2004_e.pdf [16 November 2012]. For more background information cf. A. HOZYAINOVA, The Marriage Contract: Process and Recommendations for its Implementation, in International Centre for Human Rights and Democratic Development, A Woman's Place. Perspectives on Afghanistan's Evolving Legal Framework 27-36, 31 et seq. (2010), available at: http://appro.org.af/downloads/A_Womans_Place.pdf [16 November 2012].

[304] See Afghanistan National Development Strategy, 2008-2013, at 41, available at: http://www.undp.org.af/publications/KeyDocuments/ANDS_Full_Eng.pdf [16 November 2012]. Cf. also http://www.irinnews.org/report.aspx?reportid=24431 [16 November 2012]; ERTÜRK, supra note 203 at 7; see also Afghan Child Bride's In-Laws Sentenced for Torture, CBS News, 5 May 2012, available at: http://www.cbsnews.com/8301-202_162-57428609/afghan-child-brides-in-laws-sentenced-for-torture/ [16 November 2012].

[305] See BAGHAM & MUKHATARI, supra note 303 at 5; Afghanistan Independent Human Rights Commission, Report on the Situation of Economic and Social Rights in Afghanistan, IV, November/December 2009, at 54, available at:

sion indicate that somewhere between 60 and 80 percent of all marriages involve coercion.[306] Actual enforcement of either marital age requirements or the precondition of free consent rarely occurs in practice, because infringements of these rules are scarcely punished.[307] The law in this area is thus clearly ineffective, even if the data supporting this contention are not fully reliable. Due to lack of birth and marriage registration, data are not collected comprehensively and the indications that are available are thus often based on little more than rough estimates.[308]
Another factor which could potentially affect the enforceability of statutory measures is the power vested in the the Supreme Court under article 121 of the Constitution to strike down both national and international legislation which it deems contradictory to Islam. It should be noted that the Supreme Court has not yet assessed the constitutionality of the 2009 law on violence against women, and it is unclear at this stage what position it will adopt on this matter.

e) CEDAW

In 2003, as part of the reconstruction process, Afghanistan became a signatory to the CEDAW. It is noteworthy that government ratified the convention without reservations and its applicability was reconfirmed by the 2004 constitution.[309] Practical implementation of the CEDAW does however face the same obstacles as state legislation in general. Furthermore, in 2004, some conservative members of parliament objected that the convention had been signed by the interim authority only, which – in the view of these conservative parliamentarians – did not possess the power to enter into such a commitment on behalf of the Afghan nation.[310] Also, as is the case with the 2009 law on violence against women, the Supreme Court has not yet assessed the constitutionality of the CEDAW.

III. Conclusion

In general, the classical schools of Islamic legal thought tend to regard child marriage as a form of matrimony which, though very controversial, is nevertheless admissible. Islamic scholars generally recognise the option of giving minors into marriage before puberty, and they usually equate the onset of puberty with the beginning of autonomous marriage capacity. In the absence of physical signs, scholarly opinions assume that puberty commences at slightly different lunar ages which, depending on the school, are either the same for both sexes or a little higher for male spouses. The range of marriageable ages for males extends from 15 years according to the Hanbali, the Shafi'i and the Jafari schools to 17 or 18 years in Hanafi and Maliki teaching. For female spouses, the range of marriageable ages extends from a high of 17 years, as represented by the Hanafi school, to 15 years according to both Shafi'i and Hanbali opinion, and down to as little as nine years according to Jafari teaching.
To a large extent, neither the institution of marriage involving minors, nor the assumption that young people have the necessary capacities to marry at such ages correspond to the notion of marriageability underlying modern human rights treaties. This divergence is not an exclusively Arab or Islamic problem, and until recently was still observable in other parts of the world. It is

http://www.humansecuritygateway.com/documents/AIHRC_ReportOnSituationOfEconomicAndSocialRightsInAfghanistan.pdf [16 November 2012].

306 Cf. Afghanistan Independent Human Rights Commission, supra note 305 at 55 et seq.

307 See Afghanistan National Development Strategy, supra note 304 at 41.

308 See for instance the remarks as to research methods in BAGHAM & MUKHATARI, supra note 303 at 4.

309 Art. 7 of the Constitution of 2004.

310 See C. FARHOUMAND-SIMS, CEDAW and Afghanistan, Vol. 11 No. 1 Journal of International Women's Studies 136-156, 149 et seq. (2009).

however the case that, to date, sharia lies at the heart of virtually every modern Muslim family law system, a circumstance attributable to the fact that colonial rulers prioritised the modernisation of public, commercial and procedural law over reforms to personal status law. As a result, the area of the private and the family law became the exception within state legislation in Muslim countries, which irrevocably associated family law with an intrinsic Islamic identity.[311]
To date, the close links between religion and family-law matters have resulted in many national legislators exercising considerable restraint when attempting to enact statutory reforms in marriage law. One legislative approach – as exemplified by the initiatives taken in Egypt at the beginning of the twentieth century – is to circumvent the state's strict adherence to a specific school of Islamic law by eclectically incorporating more liberal interpretations from other schools of law into statutory provisions, thus preserving the supremacy of Islamic law. Another approach is that of introducing reforms on a merely procedural level and abstaining from any direct, substantive challenges to the established sharia rules. This, again, is best exemplified by the Egyptian legislation of 1923, which denied judicial access to claims arising from under-age and unregistered marriages. In addition to these more unobtrusive initiatives, other statutory approaches have even ventured into the very essence of sharia rules by completely replacing them with 'modern' provisions modelled on European codes or based on new and autonomous concepts. A striking example of direct interventions of this kind can be seen in Afghanistan, where the Civil Code of 1977 curtailed a guardian's power to contract his minor female ward into marriage below the age of 15.
These various initiatives have resulted in a considerable number of reforms, which have generally had the effect of raising the legal marriageable age. These reforms have been, and continue to be, carried out against a background of increasing public awareness of the harmful potential of early marriage and of intensified efforts in support of reform by human and women's rights activists. It is through this prism that the ratifications of international human rights treaties such as the CEDAW need to be viewed. However, precisely because family law on the national level is generally considered a specifically Islamic affair, international human rights obligations are likely to be perceived as unjustified Western interventions devoid of the necessary understanding of, and respect for, Islamic values.[312] In terms of marriage and the family, the main problem here is the basic conception of gender roles in Islam which, by its very nature, contradicts transnational notions of human rights and gender equality. Reform-minded governments and rulers face the difficult task of reconciling international commitments with conservative religious demands and, as a consequence, often resort to relatively vague, yet far-reaching, reservations. In this regard, state institutions vested with the power to assess the constitutionality of statutory provisions, especially those associated with international conventions, have the potential to provide an important reforming counterweight to more traditional family-law notions, as the example set by the Egyptian Supreme Constitutional Court demonstrates. Conversely, these very same constitutional bodies can, when subject to strong conservative, religious influences, also constitute major impediments to reform as is the case with the Iranian Guardian Council. A similar constellation may also arise in cases where religious authorities, even when they lack any formal authority to carry out judicial reviews, exercise substantial political power and prestige of the kind enjoyed by the *ulama* in Saudi Arabia.

[311] See ABU-ODEH, supra note 39 at 1087.
[312] The same applies to national legislation based on alien ideological concepts such as Decree No. 7 of 1978 of the Marxist Revolutionary Council of Afghanistan.

The problems encountered by family-law reform extend far beyond the purely legislative level. Indeed, it is with regard to implementation and application of the law that the majority of difficulties occur. In the case of under-age and premature marriage, for example, numerous statistics have shown that statutory reforms, even though enacted, do not in fact have any practical consequences for large parts of the population. In some instances, this can be attributed to the state-controlled administration of law, in particular with regard to the judiciary and the institutions of criminal prosecution. Evidence from Egypt and Morocco shows that, in addition to the lack of appropriate training, it is the personal perceptions of judges and registry office officials which are often the root cause of even the most clearly formulated statutory law provisions being flouted, particularly in cases where there is wide scope for judicial and administrative discretion. Similarly, the fact that a child marriage is a criminal offence is meaningless in jurisdictions, such as Afghanistan, where offenders are not prosecuted.

The authority of the state often also lacks the operational wherewithal to enforce the law, as well as being overcome by geographical or political difficulties, as is the case in Morocco and Afghanistan. A critical factor here is the documentation of births and marriages, which is an essential prerequisite for any kind of state control. While the non-registration of births affects the practicability of statutory standards, the non-registration of marriages not only has severe consequences for any children born of the marriage, but also completely nullifies any of the protection afforded by statutory prescriptions, particularly as far as marital age requirements are concerned. The extreme example of Afghanistan illustrates the direct correlation between the absence of a comprehensive, functioning registration system and the failure of law enforcement. Commenting on this matter, Schneider recommends transferring the registration authority to local clerics or mullahs rather than to civil courts or registry office officials as a means of maintaining familiar and reliable structures which members of the public do not primarily associate with the presence of the state.[313]

The inefficacy of statutory law is also connected to the phenomenon of legal pluralism, i.e. the coexistence of indigenous, traditional customary law alongside statutory norms. These customary rules generally have their origins in the pre-Islamic era and, in contrast to classical Islamic law, are not uniform in character but vary significantly between specific tribes or ethnicities. Despite the deeply held religious convictions which generally characterise traditional clans, child marriage is a very common phenomenon. Poverty, property considerations and the need to keep peace between families are usually prioritised over free choice, and the idea of physical maturity as a prerequisite of marriage is generally regarded as a minor consideration. Taken together, these various factors all conspire to reduce the average age at which young spouses first marry.

Compared to tradition and religion, state legislation does not command anything like the same level of recognition among tribal populations, being, as it is, a much more recent phenomenon, which lacks both traditional and religious legitimation and is often perceived as a threat to ethnic tribal autonomy. This is well illustrated by the example of marriage registration, where statutory measures, such as the limitation of judicial access to claims arising from registered or documentarily evidenced marriages, often fail to achieve their objective and in fact prompt tribal counteraction, as can be seen in both Morocco and Afghanistan.[314] There is also evidence that social barriers can give rise to personal inhibitions against the enforcement of rights guaranteed by statutory law. Court proceedings, for example, are often simply not initiated due to

[313] See SCHNEIDER, supra note 290 at 113 et seq.; SCHNEIDER, supra note 35 at 218.
[314] Cf. SCHNEIDER, supra note 35 at 221, 226.

fears of social condemnation or public pressure resulting from a general consensus in favour of traditional methods of dispute resolution. For women, this situation can be further aggravated by the fact that in some legal systems judicial protection is contingent on male representation. Moreover, as a result of illiteracy and the inadequate provision of education, large parts of the population are often not even aware of the protection afforded to them by state legislation, nor are they necessarily familiar with classical Islamic rules. Both these factors tend to foster adherence to customary law.

Recapitulating the sensitive nature of Muslim family law in general and child marriage in particular, and taking into account the multi-layered structure of the various specific difficulties arising in this area, it is hard to imagine that attempts at reform at the international level will ever succeed in bringing about substantive changes. The inability to consider local circumstances and contexts – which is very much in evidence even at the national level – is far more pronounced at the international level. International human rights initiatives naturally tend to articulate their demands in the form of general, universally applicable principles which lack any tangible local dimensions. As a result, global human rights activism is confronted with an intrinsic dilemma, which Merry describes as follows, 'Rights need to be presented in local cultural terms to be persuasive, but they must challenge existing relations of power in order to be effective.'[315] Merry argues that human rights require translation into local, i.e. vernacular, meanings of relationships and power.[316] The main task is to transfer attitudes towards marriage and the family from the private to the public domain and to shift local conceptions of permissible and reprehensible practices over time.[317]

At this stage internal actors such as social movements or human rights NGOs are needed to mediate between the international and the local level in order to contextualise human rights and make them both accessible and acceptable.[318] In this regard, Merry rightly points out that it is important to take advantage of the adaptability of local customs and the fact that culture – if understood as a product of historical implications in a constant state of flux, rather than as a fixed, immutable set of habits and customs – can be a driving force for social change.[319] It remains to be seen if this will, over time, succeed in shifting conceptions of marriage and maturity and reconcile them with international standards in this area.

[315] See S. E. MERRY, Human Rights and Gender Violence. Translating International Law into Local Justice, 5 (2006).
[316] Cf. MERRY, supra note 315 at 1, 5.
[317] Cf. MERRY, supra note 315 at 25; HOZYAINOVA, supra note 303 at 35.
[318] Cf. MERRY, supra note 315 at 3; A. A. AN-NA'IM, State Responsibility Under International Human rights Law to Change Religious and Customary Laws, in R. J. Cook (Ed.), Human Rights of Women: National and International Perspectives 167-188, 184 (1994); BAGHAM & MUKHATARI, supra note 303 at 17.
[319] Cf. MERRY, supra note 315 at 9, 11, 15, 28.